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code of federal regulations

Labor

ORIGINAL

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29

PARTS 900 TO 1899
Revised as of July 1, 1985

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code of federal regulations

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29

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Cite this Code **CFR**

thus: **29 CFR 901.1**

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16	as of January 1
Title 17 through Title 27	as of April 1
Title 28 through Title 41	as of July 1
Title 42 through Title 50	as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

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To determine whether a Code volume has been amended since its revision date (in this case, July 1, 1985), consult the "List of CFR Sections Affected (LSA)," which is issued monthly, and the "Cumulative List of Parts Affected," which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

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Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a date certain for expiration, an appropriate note will be inserted following the text.

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The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to take steps to reduce the Federal paperwork burden for individuals, small businesses and State and local governments, as well as to maximize the usefulness of information collection. One specific requirement of the Act is for Federal agencies to display an OMB control number with the information collection request.

Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

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Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1973, consult either the List of CFR Sections Affected, 1949-1963, or 1964-1972, published in three separate volumes. For the period beginning January 1, 1973, a "List of CFR Sections Affected" is published at the end of each CFR volume.

INCORPORATION BY REFERENCE

What is incorporation by reference? Incorporation by reference was established by statute and allows Federal agencies to meet the requirement to publish regulations in the Federal Register by referring to materials already published elsewhere. For an incorporation to be valid, the Director of the Federal Register must approve it. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 552(a)). This material, like any other properly issued regulation, has the force of law.

What is a proper incorporation by reference? The Director of the Federal Register will approve an incorporation by reference only when the requirements of 1 CFR Part 51 are met. Some of the elements on which approval is based are:

(a) The incorporation will substantially reduce the volume of material published in the Federal Register.

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Properly approved incorporations by reference in this volume are listed in the Finding Aids at the end of this volume.

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A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I), and Acts Requiring Publication in the Federal Register (Table III). A list of CFR Titles, Chapters, and Parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of "Title 3—The President" is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the "Contents" entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

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For a summary, legal interpretation, or other explanation of any regulation in this volume, contact the issuing agency. Inquiries concerning editing procedures and reference assistance with respect to the Code of Federal Regulations may be addressed to the Director, Office of the Federal Register, National Archives and Records Administration, Washington, D.C. 20408 (telephone 202-523-3517). Sales are handled exclusively by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 (telephone 202-783-3238).

JOHN E. BYRNE,
Director,
Office of the Federal Register.

July 2, 1985.

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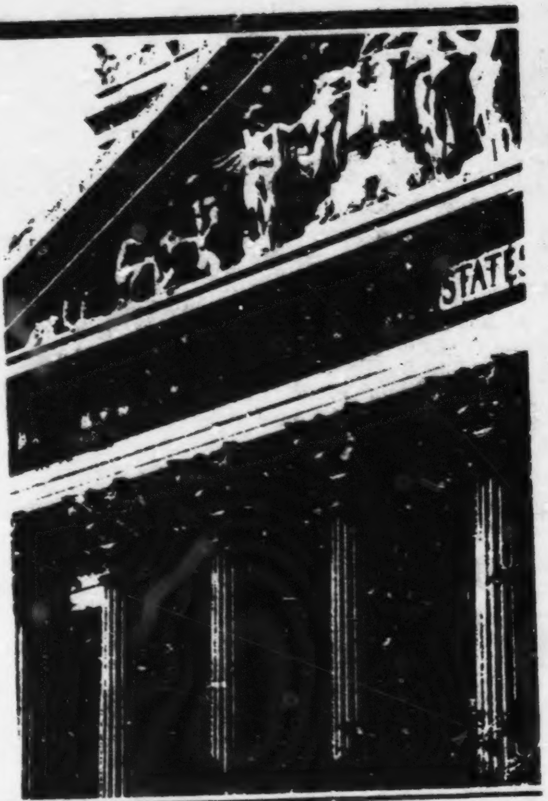
THIS TITLE

Title 29—Labor is composed of seven volumes. The parts in these volumes are arranged in the following order: Parts 0-99, Parts 100-499, Parts 500-899, Parts 900-1899, Parts 1900-1910, Parts 1911-1919, and Part 1920 to end. The contents of these volumes represent all current regulations codified under this title as of July 1, 1985.

Subject indexes appear following the occupational safety and health standards (Part 1910), and following the safety and health regulations for: Longshoring (Part 1918), Gear Certification (Part 1919), and Construction (Part 1926).

For this volume, Ina C. Masters was Chief Editor. The Code of Federal Regulations is published under the direction of Martha B. Girard, assisted by Robert E. Jordan.



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X

Title 29—Labor

(This book contains Parts 900 to 1899)

SUBTITLE B—REGULATIONS RELATING TO LABOR (Continued)

Part

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CHAPTER XII—Federal Mediation and Conciliation Service ... 1400

CHAPTER XIV—Equal Employment Opportunity Commission 1600

CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR Chapter II.

Social Security Administration, Department of Health and Human Services: See Employees' Benefits, 20 CFR Chapter III.

EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR Chapters I, IV, V, VI, and VII; 29 CFR Subtitle A, Chapters II, IV, XVII, and XXV; 41 CFR Chapters 50 and 60; and 48 CFR Chapter 29. For Standards for a Merit System of Personnel Administration: See 5 CFR Part 900.

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CHAPTER IX—CONSTRUCTION INDUSTRY COLLECTIVE BARGAINING COMMISSION

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PART 900 [RESERVED]

PART 901—POLICY STATEMENT ON COLLECTIVE BARGAINING DISPUTES AND APPLICABLE PROCEDURES

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901.1 Scope and application.
901.2 Policy of Commission.
901.3 Participation by Commission.
901.4 Handling of disputes by Commission.
901.5 Agreement to refrain from strike or lockout.
901.6 Authority of Executive Director.
901.7 Inquiries and correspondence with Commission.

AUTHORITY: E.O. 11482; 3 CFR, 1969 Comp., p. 139.

SOURCE: 35 FR 4752, Mar. 19, 1970, unless otherwise noted.

§ 901.1 Scope and application.

The Construction Industry Collective Bargaining Commission hereby states its policy and sets forth procedures for handling disputes involving the standard labor and management organizations in the building and construction industry. These procedures are pursuant to the authority set forth in Executive Order 11482, dated September 22, 1969. Section 6 of the order states that, "The Commission is authorized to issue such rules and regulations, and to adopt such procedures governing its affairs, including the conduct of its disputes settlement functions, as shall be necesssary and appropriate to effectuate the objectives of this order."

§ 901.2 Policy of Commission.

Section 3(c) of the Executive order provides that it is an objective of the Commission "to establish more effective machinery for the resolution of disputes over the terms of collective bargaining agreements which at the same time recognizes the interests of each branch of the industry and preserves existing procedures that have been effective." Accordingly, it is the policy of the Commission:

(a) To encourage each branch of the industry without such a procedure to establish its own procedures to facilitate the settlement of disputes over the terms and application of collective bargaining agreements.

(b) To encourage each branch of the industry having such a procedure, but which procedure is limited in application, to expand the application of such procedure.

(c) To encourage parties in each branch of construction with a procedure to utilize that machinery in all possible cases.

(d) To encourage the Federal Mediation and Conciliation Service to refer disputes wherever possible to such machinery established in various branches of the industry.

§ 901.3 Participation by Commission.

(a) The Commission will consider participation in specific disputes which conform with the following criteria:

(1) The disputes will have a significant impact on construction activity in the area involved.

(2) The dispute concerns negotiations for a new or expiring agreement, or a question of interpretation or application of an existing agreement, where all other internal methods of resolution have been exhausted.

(b) The Commission will normally refrain from participating in specific disputes where:

(1) The dispute involved concerns jurisdiction of work.

(2) The parties have failed to utilize an independent disputes handling procedure presently in existence or subsequently established. (A number of such procedures exists currently in several branches of the industry.)

(3) The parties have not fully utilized the service of the Federal Mediation and Conciliation Service.

(c) In setting forth a disputes procedure the Commission emphasizes that it is not intended to provide a substitute for the collective bargaining process. Nor is it a means to bypass or neglect existing mediation facilities or industry branch dispute settling procedures. The standard procedure for the Commission to accept cognizance over a collective bargaining dispute is through referral to the Commission by the Director of the Federal Mediation and Conciliation Service. The Commission will exercise its judgment in accepting or declining specific disputes. The staff of the Commission is directed to maintain close contact with the Federal Mediation and Conciliation Service on all aspects of bargaining in the construction industry and to see that critical disputes are brought to the attention of the appropriate International Union and the national offices of an appropriate contractor association.

§ 901.4 Handling of disputes by Commission.

The Commission will determine the particular method of dispute handling appropriate for each dispute. Section 5(a) of the Executive order states, "The Commission or a panel designated by the Commission may, with the assistance of national labor organizations and national contractor assoications where appropriate, seek to mediate such dispute, or make an investigation of the facts of the dispute and make such recommendations to the parties for the resolution thereof as it determines appropriate."

§ 901.5 Agreement to refrain from strike or lockout.

As part of its conditions for entering the dispute, the Commission may request the parties to continue the terms or conditions of employment without the occurrence of a strike or lockout for a 30-day period, as set forth in section 5(a) of the Executive Order, to enhance the functions of mediation and other related activities.

§ 901.6 Authority of Executive Director.

The Commission delegates authority to the Executive Director to accept or reject requests for Commission involvement in those instances where a Commission meeting would not occur in sufficient time prior to a contract expiration date to permit such involvement.

§ 901.7 Inquiries and correspondence with Commission.

Inquiries to the Commission about the status of disputes or other matters should be directed as follows:

Executive Director, Construction Industry Collective Bargaining Commission, Room 5220, Department of Labor Building, 14th and Constitution Avenue NW., Washington, D.C. 20210. Telephone: (202) 961-3736.

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Abbreviation: The following abbreviation is used in this chapter:

NMB=*National Mediation Board.*

PART 1200—MINIMUM STANDARDS OF CONDUCT FOR EMPLOYEES OF THE NATIONAL MEDIATION BOARD

Subpart A—Introduction

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1200.735-1 General.
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1200.735-40 Form and content of statements.
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1200.735-49 Effect of employees' statements on other requirements.
1200.735-50 Specific provisions of Board regulations for special Government employees.

AUTHORITY: E.O. 11222 of May 8, 1965, 30 FR 6469, 3 CFR, 1965 Supp.; 5 CFR 735.104.

SOURCE: 32 FR 15827, Nov. 17, 1967, unless otherwise noted.

Subpart A—Introduction

§ 1200.735–1 General.

(a) The promulgation of these minimum standards of ethical conduct for employees and special Government employees of the National Mediation Board has as its objective the maintaining and reaffirming of the public's confidence in the activities of their Government. The regulations in this part are intended to act as the board moral and ethical guideposts for employees of the Board and to supplement and verbalize the individual ethic and integrity of the employees affected. The avoidance of misconduct and conflict of interest on the part of Government employees and special Government employees through informed judgment is indispensable to the maintenance of these standards.

(b) The elimination of conflicts of interests in the Federal service is one of the most important objectives in establishing general standards of conduct. A conflict-of-interest situation may be defined as one in which a Federal employee's private interest, usually of an economic nature, conflicts or raises a reasonable question of conflict with his public duties and responsibilities. The potential conflict is of concern whether it is real or only apparent.

(c) The failure of an employee to observe the basic principles of good conduct, ethics, and integrity will result in immediate adverse or disciplinary action of a severity in keeping with the offense committed and in accordance with equitable administrative practice.

(d) These standards are established in conformity with Part 735 of Title 5 of the Code of Federal Regulations.

§ 1200.735-2 Interpretation and advisory service.

It shall be the practice of the National Mediation Board to appoint as counselor for the agency one of the members of the Board itself. Based upon the experience, usually legal, and position of such individual, employees of the Board will more naturally express complete personal confidence in such a counselor. This individual shall coordinate the Board's counseling services, which services shall be brought to the attention of the Board's employees and special Government employees within 90 days after the approval of the agency's regulations by the Commission. In the case of new employees, notification of the availability of counseling services shall be effected upon their entrance on duty.

§ 1200.735-3 Reviewing statements and reporting conflicts of interest.

(a) When a statement submitted or information from other sources indicates a conflict between the interests of an employee or special Government employee and the performance of his services for the Government, and when the conflict or appearance of conflict is not resolved at a lower level, the information concerning the conflict or appearance of the conflict shall be reported to the Board through the counselor for the Board.

(b) The employee or special Government employee concerned shall be provided an opportunity to explain the conflict or appearance of conflict.

§ 1200.735-4 Disciplinary and other remedial action.

(a) A violation of the regulations in this part by an employee or special Government employee may be cause for appropriate disciplinary action which may be in addition to any penalty prescribed by law.

(b) When after consideration of the explanation of the employee or special Government employee the Board decides that remedial action is required, immediate action shall be taken to end the conflicts or appearance of conflicts of interest. Remedial action may include, but is not limited to:

(1) Change in assigned duties;

(2) Divestment by the employee or special Government employee of his conflicting interest;

(3) Disciplinary action; or

(4) Disqualification for a particular assignment.

(c) Remedial action, whether disciplinary or otherwise, shall be effected in accordance with any applicable laws, Executive orders, and regulations.

Subpart B—Ethical Conduct and Responsibilities of Employees

§ 1200.735-20 Proscribed actions.

(a) An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in or create the appearance of:

(1) Using public office for private gain;

(2) Giving preferential treatment to any person;

(3) Impeding Government efficiency or economy;

(4) Losing complete independence or impartiality;

(5) Making a Government decision outside of official channels; or

(6) Affecting adversely the confidence of the public in the integrity of the Government.

§ 1200.735-21 Gifts, entertainment, and favors.

(a) An employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value from a person who:

(1) Has, or is seeking to obtain, contractual or other business of financial relations with the Board;

(2) Conducts operations or activities that are regulated by the Board; or

(3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

(b) The restrictions set forth in paragraph (a) of this section do not apply to:

(1) Obvious family or personal relationships when the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors;

(2) The acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or during an investigation where an employee may be properly in attendance;

(3) The acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans; and

(4) The acceptance of unsolicted advertising or promotional material, such as pens, pencils, note pads, calendars, and other items of nominal intrinsic value.

(c) [Reserved]

(d) An employee shall not solicit a contribution from another employee for a gift to an official superior, making a donation as a gift to an official superior, or accept a gift from an employee receiving less pay than himself (5 U.S.C. 7351). However, this paragraph does not prohibit a voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness or retirement.

(e) An employee shall not accept a gift, present, decoration, or other things from a foreign government unless authorized by Congress as provided by the Constitution and in Pub. L. 89-673, 80 Stat. 952.

(f) Neither this section nor § 1200.735-22 precludes an employee from receipt of bona fide reimbursement, unless prohibited by law, for expenses of travel and such other necessary subsistence as is compatible with this part for which no Government payment or reimbursement is made. However, this paragraph does not allow an employee to be reimbursed, or payment to be made on his behalf, for excessive personal living expenses, gifts, entertainment or other personal benefits, nor does it allow an employee to be reimbursed by a person for travel on official business under Board orders when reimbursement is proscribed by Decision B-128527 of the Comptroller General dated March 7, 1967.

§ 1200.735-22 Outside employment and other activity.

(a) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment. Incompatible activities include but are not limited to:

(1) Acceptance of a fee, compenstion, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest; or

(2) Outside employment which tends to impair his mental or physical capacity to perform his government duties and responsibilities in an acceptable manner.

(b) An employee shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Government.

(c) Employees are encouraged to engage in teaching, lecturing and writing that is not prohibited by law, the Executive Order, or the Board regulations. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, or writing, including teaching, lecturing, or writing for the purpose of the special preparation of a person or class of persons for an examination of the Commission or Board of Examiners for the Foreign Service, that depends on information obtained as a result of his Government employment, except when that information has been made available to the general public or will be made available on request, or when the Board gives written authorization for use of nonpublic information on the basis that the use is in the public interest. In addition, an employee who is a Presidential appointee covered by section 401(a) of Executive Order 11222 shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance, the subject matter of which is devoted substantially to the responsibilities, programs, or operations of the Board, or which draws substantially on official data or ideas which have not become part of the body of public information.

[32 FR 15827, Nov. 17, 1967, as amended at 33 FR 11816, Aug. 21, 1968]

§ 1200.735-23 Financial interests.

(a) An employee shall not:

(1) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his governmental duties and responsibilities; or

(2) Engage in, directly or indirectly, a financial transaction as a result of, or primarily relying on, information obtained through his Government employment.

(b) An employee is not precluded from having a financial interest or engaging in financial transactions to the same extent as a private citizen not employed by the Government so long as it is not prohibited by law, the Executive Order or the Board regulations in this part.

§ 1200.735-24 Use of Government property.

An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. An employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him.

§ 1200.735-25 Misuse of information.

For the purpose of furthering a private interest, an employee shall not, directly or indirectly use, or allow the use of, official information obtained through or in connection with his Government employment which has not been made available to the general public.

§ 1200.735-26 Indebtedness.

An employee shall pay each just financial obligation in a proper and timely manner, especially one imposed by law such as Federal, State, or local taxes. A "just financial obligation" means one acknowledged by the employee or reduced to judgment by a court, and "in a proper and timely manner" means in a manner which the Board determines does not, under the circumstances, reflect adversely on the Government as his employer. In the event of dispute between an employee and an alleged creditor, the Board is not required to determine the validity or amount of the disputed debt.

§ 1200.735-27 Gambling, betting, and lotteries.

An employee shall not participate, while on Government owned or leased property or while on duty for the Government in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket.

§ 1200.735-28 General conduct prejudicial to the Government.

An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

§ 1200.735-29 Miscellaneous statutory provisions.

Each employee shall acquaint himself with each status that relates to his ethical and other conduct as an employee of the Board and of the Government. The following statutory provisions are to be noted:

(a) House Concurrent Resolution 175, 85th Congress, 2d session, 72 Stat. B12, the "Code of Ethics for Government Service."

(b) Chapter 11 of the title 18, U.S.C., relating to bribery, graft, and conflicts of interest, as appropriate to the employees concerned.

(c) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(d) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(e) The prohibition against the employment of a member of a Communist organization (50 U.S.C. 784).

(f) The prohibitions against:

(1) The disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783), and

(2) The disclosure of confidential information (18 U.S.C. 1905).

(g) The provisions relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(h) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

(i) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(j) The prohibition against the use of deceit in an examination of personnel action in connection with Government employment (18 U.S.C. 1917).

(k) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(l) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(m) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(n) The prohibitions against:

(1) Embezzlement of Government money or property (18 U.S.C. 641);

(2) Failing to account for public money (18 U.S.C. 643); and

(3) Embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(o) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(p) The prohibition against prescribed political activities in Subchapter III of Chapter 73 of Title 5, United States Code and 18 U.S.C. 602, 603, 607, and 608.

(q) The prohibition against an employee acting as an agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

Subpart C—Board Regulations Governing Ethical and Other Conduct and Responsibilities of Special Government Employees

§ 1200.735-30 Special provisions of Board regulations.

Special Government employees, including those individuals categorized as WAE (When as employed), shall be put on actual notice regarding section 5, Third (a), and 7, Third (d) of the Railway Labor Act, 45 U.S.C. Chapter 8, which provide that arbitrators appointed by the Board shall be impartial without bias and disinterested. These Board appointed arbitrators or neutrals shall be further notified of the intent of Executive Order 11222 governing conflict of interests and ethical standards of Government employees.

§ 1200.735-31 Use of Government employment.

A special Government employee shall not use his Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself or another person, particularly one with whom he has family, business, or financial ties.

§ 1200.735-32 Outside activities of special Government employees.

Special Government employees may teach, lecture, or write in a manner not inconsistent with § 1200.735-22(c) governing other employees.

§ 1200.735-33 Use of inside information.

A special Government employee shall not use inside information obtained as a result of his Government employment for private gain for himself or another person whether by direct action on his part or by counsel, recommendation, or suggestion to another person, particularly one with whom he has family, business, or financial ties. For the purpose of this section, "inside information" means information obtained under Government authority which has not become part of the body of public information.

§ 1200.735-34 Coercion.

A special Government employee shall not use his Government employment to coerce or give the appearance of coercing, a person to provide financial benefit to himself or another person, particularly one with whom he has family, business, or financial ties.

§ 1200.735-35 Gifts, entertainment, and favors.

(a) A special Government employee, while so employed or in connection with his employment, shall not receive or solicit from a person having business with the Board anything of value as a gift, gratuity, loan, entertainment, or favor for himself or another person, particularly one with whom he has family, business or financial ties.

(b) The exceptions enumerated under § 1200.735-21(b) are applicable to special Government employees.

Subpart D—Board Regulations Governing Statements of Employment and Financial Interests

§ 1200.735-40 Form and content of statements.

The statements of employment and financial interests required for use by employees and special Government employees shall contain, as a minimum, the information required by the formats prescribed by the Commission in the Federal Personnel Manual.

§ 1200.735-41 Employees required to submit statements.

The Board shall require statements of employment and financial interests from the following employees: Board's Executive Secretary.

§ 1200.735-41a Employee's complaint on filing requirement.

Any employee required to submit statements pursuant to § 1200.735-41, who believes his inclusion under Board regulations is improper, may file a complaint directed to the Ethical Conduct Counselor of the National Mediation Board.

§ 1200.735-42 Employees not required to submit statements.

A statement of employment and financial interests is not required of Board members. These Board members are subject to separate reporting requirements under section 401 of Executive Order 11222.

§ 1200.735-43 Time and place for submission of employees' statements.

An employee required to submit a statement of employment and financial interests under the regulations in this part shall submit that statement to the Counselor of Ethical Standards not later than:

(a) Ninety days after the effective date of the Board regulations in this part if employed on or before that effective date; or

(b) Thirty days after his entrance on duty, but not earlier than 90 days after the effective date, if appointed after that effective date.

§ 1200.735-44 Supplementary statements.

Changes in, or additions to, the information contained in an employee's statement of employment and financial interests shall be reported in a supplementary statement as of June 30 each year, except when the Civil Service Commission authorizes a different date on a showing by the Board of necessity therefor. If no changes or additions occur, a negative report is required. Notwithstanding the filing of the annual report required by this section, each employee shall at all times avoid acquiring a financial interest that could result or taking an action that would result, in a violation of the conflicts-of-interest provisions of section 208 of title 18, United States Code, or Subpart B of this part.

§ 1200.735-45 Interests of employees' relatives.

The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee. For the purpose of this section, "member of an employee's immediate household" means those blood relations who are residents of the employee's household.

§ 1200.735-46 Information not known by employees.

If any information required to be included on a statement of employment and financial interests or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information in his behalf.

§ 1200.735-47 Information prohibited.

This section does not require an employee to submit on a statement of employment and financial interests or supplementary statement any information relating to the employee's connection with or interest in, professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed "business enterprises" and are required to be included in an employee's statement of employment and financial interests.

§ 1200.735-48 Confidentiality of employees' statements.

The Board shall hold each statement of employment and financial interests and each supplementary statement, in confidence. To insure this confidentiality, the Board shall designate which employees are authorized to review and retain the statements. Employees so designated are responsible for maintaining the statements in confidence and shall not allow access to, or allow information to be disclosed from, a statement except to carry out the purpose of this part. The Board shall not disclose information from a statement except as the Civil Service Commission or the Board may determine for good cause shown.

§ 1200.735-49 Effect of employees' statements on other requirements.

The statements of employment and financial interests and supplementary statements required of employees are in addition to, and not in substitution for or in derogation of, any similar requirement imposed by law, order, or regulation. The submission of a statement or supplementary statement by an employee does not permit him or any other person to participate in a manner in which his or the other person's participation is prohibited by law, order, or regulations.

§ 1200.735-50 Specific provisions of Board regulations for special Government employees.

(a) Each special Government employee appointed by the National Mediation Board shall file a statement of employment and financial interests on a form to be furnished by the Board. However, the following special Government employees are not required to file a statement of employment and financial interests: Neutrals, referees, and arbitrators, who are exempted due to the fact that the duties of the positions held by these employees are of such a nature and at such a level of responsibility that the submission of such a statement is not necessary to protect the integrity of the Government.

(b) It shall be the duty of the National Mediation Board to notify each of its special Government employees of the specific requirements of the Railway Labor Act and Executive Order 11222 concerning impartiality, integrity, and conflicts of interest.

(c) The statement of employment and financial interests required in this section shall be submitted not later than the time of employment of the special Government employee as provided in the Board's regulations in this part. Each special Government employee shall keep his statement current throughout his employment with the Board by the submission of supplementary statements.

PART 1201—DEFINITIONS

Sec.
1201.1 Carrier.
1201.2 Exceptions.
1201.3 Determination as to electric lines.
1201.4 Employee.
1201.5 Exceptions.
1201.6 Representatives.

AUTHORITY: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

SOURCE: 11 FR 117A-922, Sept. 11, 1946, unless otherwise noted. Redesignated at 13 FR 8740, Dec. 30, 1948.

§ 1201.1 Carrier.

The term "carrier" includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act (24 Stat. 379, as amended; 49 U.S.C. 1 et seq.), and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier."

§ 1201.2 Exceptions.

(a) The term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

(b) The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to carrier where delivery is not beyond the tipple, and the operation of equipment or facilities therefor or any of such activities.

§ 1201.3 Determination as to electric lines.

The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any part interested to determine after hearing whether any line operated by electric power falls within the terms of this part.

§ 1201.4 Employee.

The term "employee" as used in this part includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

§ 1201.5 Exceptions.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

§ 1201.6 Representatives.

The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

PART 1202—RULES OF PROCEDURE

Sec.

1202.1 Mediation.
1202.2 Interpretation of mediation agreements.
1202.3 Representation disputes.
1202.4 Secret ballot.
1202.5 Rules to govern elections.
1202.6 Access to carrier records.
1202.7 Who may participate in elections.
1202.8 Hearings on craft or class.
1202.9 Appointment of arbitrators.
1202.10 Appointment of referees.

Sec.
1202.11 Emergency boards.
1202.12 National Air Transport Adjustment Board.
1202.13 Air carriers.
1202.14 Labor members of Adjustment Board.
1202.15 Length of briefs in NMB hearing proceedings.

AUTHORITY: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

SOURCE: 11 FR 177A-922, Sept. 11, 1946, unless otherwise noted. Redesignated at 13 FR 8740, Dec. 30, 1948.

§ 1202.1 Mediation.

The mediation services of the Board may be invoked by the parties, or either party, to a dispute between an employee or group of employees and a carrier concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference; also, concerning a dispute not referable to the National Railroad Adjustment Board or appropriate airline adjustment board, when not adjusted in conference between the parties, or where conferences are refused. The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

§ 1202.2 Interpretation of mediation agreements.

Under section 5, Second, of Title I of the Railway Labor Act, in any case in which a controversy arises over the meaning or application of any agreement reached through mediation, either party to said agreement, or both, may apply to the National Mediation Board for an interpretation of the meaning or application of such agreement. Upon receipt of such request, the Board shall, after a hearing of both sides, give its interpretation within 30 days.

§ 1202.3 Representation disputes.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act, it is the duty of the Board, upon request of either party to the dispute, to investigate such dispute and certify to both parties, in writing, the name or names of individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and to certify the same to the carrier.

§ 1202.4 Secret ballot.

In conducting such investigation, the Board is authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier.

§ 1202.5 Rules to govern elections.

In the conduct of a representation election, the Board shall designate who may participate in the election, which may include a public hearing on craft or class, and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within 10 days designate the employees who may participate in the election.

§ 1202.6 Access to carrier records.

Under the Railway Labor Act the Board has access to and has power to make copies of the books and records of the carriers to obtain and utilize such information as may be necessary to fulfill its duties with respect to representatives of carrier employees.

§ 1202.7 Who may participate in elections.

As mentioned in § 1202.3, when disputes arise between parties to a representation dispute, the National Mediation Board is authorized by the Act to determine who may participate in the selection of employees representatives.

§ 1202.8 Hearings on craft or class.

In the event the contesting parties or organizations are unable to agree on the employees eligible to participate in the selection of representatives, and either party makes application by letter for a formal hearing before the Board to determine the dispute, the Board may in its discretion hold a public hearing, at which all parties interested may present their contentions and argument, and at which the carrier concerned is usually invited to present factual information. At the conclusion of such hearings the Board customarily invites all interested parties to submit briefs supporting their views, and after considering the evidence and briefs, the Board makes a determination or finding, specifying the craft or class of employees eligible to participate in the designation of representatives.

§ 1202.9 Appointment of arbitrators.

Section 5, Third, (a) of the Railway Labor Act provides in the event mediation of a dispute is unsuccessful, the Board endeavors to induce the parties to submit their controversy to arbitration. If the parties so agree, and the arbitrators named by the parties are unable to agree upon the neutral arbitrator or arbitrators, as provided in section 7 of the Railway Labor Act, it becomes the duty of the Board to name such neutral arbitrators and fix the compensation for such service. In performing this duty, the Board is required to appoint only those whom it deems wholly disinterested in the controversy, and to be impartial and without bias as between the parties thereto.

§ 1202.10 Appointment of referees.

Section 3, Third, (e) Title I of the act makes it the duty of the National Mediation Board to appoint and fix the compensation for service a neutral person known as a "referee" in any case where a division of the National Railroad Adjustment Board becomes deadlocked on an award, such referee to sit with the division and make an award. The National Mediation Board in appointing referees is bound by the same requirements that apply in the appointment of neutral arbitrators as outlined in § 1202.9

§ 1202.11 Emergency boards.

Under the terms of section 10 of the Railway Labor Act, if a dispute between a carrier and its employees is not adjusted through mediation or the other procedures prescribed by the act, and should, in the judgment of the National Mediation Board, threaten to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Board shall notify the President, who may thereupon, in his discretion, create an emergency board to investigate and report to him respecting such dispute. An emergency board may be composed of such number of persons as the President designates, and persons so designated shall not be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of emergency board members is fixed by the President. An emergency board is created separately in each instance, and is required to investigate the facts as to the dispute and report thereon to the President within 30 days from the date of its creation.

§ 1202.12 National Air Transport Adjustment Board.

Under section 205, Title II, of the Railway Labor Act, when in the judgment of the National Mediation Board it becomes necessary to establish a permanent national board of adjustment for the air carriers subject to the act to provide for the prompt and orderly settlement of disputes between the employees and the carriers growing out of grievances, or out of the application or interpretation of working agreements, the Board is empowered by its order made, published, and served, to direct the air carriers and labor organizations, national in scope, to select and designate four representatives to constitute a Board known as the National Air Transport Adjustment Board. Two members each shall be selected by the air carriers and the labor organizations of their employees. Up to the present time, it has not been considered necessary to establish the National Air Transport Adjustment Board.

§ 1202.13 Air carriers.

By the terms of Title II of the Railway Labor Act, which was approved April 10, 1936, all of Title I, except section 3, which relates to the National Railroad Adjustment Board, was extended to cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and to all employees or subordinate officials of such air carriers.

§ 1202.14 Labor members of Adjustment Board.

Section 3, First, (f) of Title I of the Railway Labor Act relating to the settlement of disputes among labor organizations as to the qualification of any such organization to participate in the selection of labor members of the Adjustment Board, places certain duties upon the National Mediation Board. This section of the act is quoted below:

> (f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the secretary shall notify the Mediation Board accordingly, and within 10 days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within 30 days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2, hereof, and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

§ 1202.15 Length of briefs in NMB hearing proceedings.

(a) In the event briefs are authorized by the Board or the assigned Hearing Officer, principal briefs shall not exceed fifty (50) pages in length and reply briefs, if permitted, shall not exceed twenty-five (25) pages in length unless the participant desiring to submit a brief in excess of such limitation requests a waiver of such limitation from the Board which is received within five (5) days of the date on which the briefs were ordered or, in the case of a reply brief, within five (5) days of receipt of the principal brief, and in such cases the Board may require the filing of a summary of argument, suitably paragraphed which shoud be a succinct, but accurate and clear, condensation of the argument actually made in the brief.

(b) The page limitations provided by this section (§ 1202.15) are exclusive of those pages containing the table of contents, tables of citations and any copies of administrative or court decisions which have been cited in the brief. All briefs shall be submitted on standard 8½ X 11 inch paper with double spaced type.

(c) Briefs not complying with this section (§ 1202.15) will be returned promptly to their initiators.

[44 FR 10601, Feb. 22, 1979]

PART 1203—APPLICATIONS FOR SERVICE

Sec.
1203.1 Mediation services.
1203.2 Investigation of representation disputes.
1203.3 Interpretation of mediation agreements.

AUTHORITY: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

SOURCE: 11 FR 177A-923, Sept. 11, 1946, unless otherwise noted. Redesignated at 13 FR 8740, Dec. 30, 1948.

§ 1203.1 Mediation services.

Applications for the mediation services of the National Mediation Board under section 5, First, of the Railway Labor Act, may be made on printed forms N.M.B. 2, copies of which may be secured from the Board's Secretary. Such applications and all correspondence connected therewith should be submitted in duplicate. The application should show the exact nature of the dispute, the number of employees involved, name of the carrier and name of the labor organization, date of agreement between the parties, if any, date and copy of notice served by the invoking party to the other and date of final conference between the parties. Application should be signed by the highest officer of the carrier who has been designated to handle disputes under the Railway Labor Act, or by the chief executive of the labor organization, whichever party files the application. These applications, after preliminary investigation in the Board's officer, are given docket number in series "A" and the cases are assigned for mediation to Board members or to mediators on the Board's staff.

§ 1203.2 Investigation of representation disputes.

Applications for the services of the National Mediation Board under section 2, ninth, of the Railway Labor Act to investigate representation disputes among carriers' employees may be made on printed forms NMB-3, copies of which may be secured from the Board's Executive Secretary. Such applications and all correspondence connected therewith should be filed in duplicate and the applications should be accompanied by signed authorization cards from the employees composing the craft or class involved in the dispute. The applications should show specifically the name or description of the craft of class of employees involved, the name of the invoking organization, the name of the organization currently representing the employees, if any, and the estimated number of employees in each craft or class involved. The applications should be signed by the chief executive of the invoking organization, or other authorized officer of the organization. These disputes are given docket numbers in series "R".

[43 FR 30053, July 13, 1978]

§ 1203.3 Interpretation of mediation agreements.

(a) Applications may be filed with the Board's Secretary under section 5, Second, of the Railway Labor Act, for the interpretation of agreements reached in mediation under section 5, First. Such applications may be made by letter from either party to the mediation agreement stating the specific question on which an interpretation is desired.

(b) This function of the National Mediation Board is not intended to conflict with the provisions of section 3 of the Railway Labor Act. Providing for interpretation of agreements by the National Railroad Adjustment Board. Many complete working agreements are revised with the aid of the Board's mediating services, and it has been the Board's policy that disputes involving the interpretation or application of such agreements should be handled by the Adjustment Board. Under this section of the law the Board when called upon may only consider and render an interpretation on the specific terms of an agreement actually signed in mediation, and not for matters incident or corollary thereto.

PART 1204—LABOR CONTRACTS

Sec.

1204.1 Making and maintaining contracts.
1204.2 Arbitrary changing of contracts.
1204.3 Filing of contracts.

AUTHORITY: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

SOURCE: 11 FR 177A-924, Sept. 11, 1946, unless otherwise noted. Redesignated at 13 FR 8740, Dec. 30, 1948.

§ 1204.1 Making and maintaining contracts.

It is the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain contracts covering rates of pay, rules, and working conditions.

§ 1204.2 Arbitrary changing of contracts.

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditons of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of the Railway Labor Act.

§ 1204.3 Filing of contracts.

Section 5, Third, (e) of the Railway Labor Act requires all carriers to file with the National Mediation Board copies of all contracts in effect with organizations representing their employees, covering rates of pay, rules, and working conditions. Several thousand of such contracts are on file in the Board's Washington office and are available for inspection by interested parties.

PART 1205—NOTICES IN RE: RAILWAY LABOR ACT

Sec.
1205.1 Handling of disputes.
1205.2 Employees' Bill of Rights.
1205.3 General Order No. 1.
1205.4 Substantive rules.

AUTHORITY: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

SOURCE: 11 FR 177A-924, Sept. 11, 1946, unless otherwise noted. Redesignated at 13 FR 8740, Dec. 30, 1948.

§ 1205.1 Handling of disputes.

Section 2, Eighth, of the Railway Labor Act provides that every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by order of the Mediation Board and requires that all disputes between a carrier and its employees will be handled in accordance with the requirements of the act. In such notices there must be printed verbatim, in large type, the third, fourth, and fifth paragraphs of said section 2, Eighth, of the Railway Labor Act.

§ 1205.2 Employees' Bill of Rights.

The provisions of the third, fourth, and fifth paragraphs of section 2 are by law made a part of the contract of employment between the carrier and each employee and shall be binding upon the parties regardless of any other express or implied agreements between them. Under these provisions the employees are guaranteed the right to organize without interference of management, the right to determine who shall represent them, and the right to bargain collectively through such representatives. This section makes it unlawful for any carrier to require any person seeking employment to sign any contract promising to join or not to join a labor organization. Violation of the foregoing provisions is a misdemeanor under the law and subjects the offender to punishment.

§ 1205.3 General Order No. 1.

General Order No. 1, issued August 14, 1934, is the only order the Board has issued since its creation in 1934. This order sent to the President of each carrier coming under the act transmitted a sample copy of the Mediation Board's Form MB-1 known as "Notice in re: Railway Labor Act." The order prescribes that such notices are to be standard as to contents, dimensions of sheet, and size of type and that they shall be posted promptly and maintained continuously in readable condition on all the usual and customary bulletin boards giving information to employees and at such other places as may be necessary to make them accessible to all employees. Such notices must not be hidden by other papers or otherwise obscured from view.

§ 1205.4 Substantive rules.

The only substantive rules issued by the National Mediation Board are those authorized under section 2, Ninth, of the Railway Labor Acts to implement the procedure of determining employee representation.

[12 FR 2451, April 16, 1947. Redesignated at 13 FR 8740, Dec. 30, 1948]

PART 1206—HANDLING REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

Sec.
1206.1 Run-off elections.
1206.2 Percentage of valid authorizations required to determine existence of a representation dispute.
1206.3 Age of authorization cards.
1206.4 Time limits on applications.
1206.5 Necessary evidence of intervenor's interest in a representation dispute.
1206.6 Eligibility of dismissed employees to vote.
1206.7 Construction of this part.
1206.8 Amendment or recission of rules in this part.

AUTHORITY: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

SOURCE: 12 FR 3083, May 10, 1947, unless otherwise noted. Redesignated at 13 FR 8740, Dec. 30, 1948.

§ 1206.1 Run-off elections.

(a) If in an election among any craft or class no organization or individual receives a majority of the legal votes cast, or in the event of a tie vote, a second or run-off election shall be held forthwith: *Provided*, That a written request by an individual or organization entitled to appear on the run-off ballot is submitted to the Board within ten (10) days after the date of the report of results of the first election.

(b) In the event a run-off election is authorized by the Board, the names of the two individuals or organizations which received the highest number of votes cast in the first election shall be placed on the run-off ballot, and no blank line on which votes may write in the name of any organization or individual will be provided on the run-off ballot.

(c) Employees who were eligible to vote at the conclusion of the first election shall be eligible to vote in the run-off election except (1) those employees whose employment relationship has terminated, and (2) those employees who are no longer employed in the craft or class.

§ 1206.2 Percentage of valid authorizations required to determine existence of a representation dispute.

(a) Where the employees involved in a representation dispute are represented by an individual or labor organization, either local or national in scope and are covered by a valid existing contract between such representative and the carrier a showing of proved authorizations (checked and verified as to date, signature, and employment status) from at least a majority of the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act.

(b) Where the employees involved in a representation dispute are unrepresented, a showing of proved authorizations from at least thirty-five (35) percent of the employees in the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act.

§ 1206.3 Age of authorization cards.

Authorizations must be signed and dated in the employee's own handwriting or witnessed mark. No authorizations will be accepted by the National Mediation Board in any employee representation dispute which bear a date prior to one year before the date of the application for the investigation of such dispute.

§ 1206.4 Time limits on applications.

Except in unusual or extraordinary circumstances, the National Mediation Board will not accept an application for investigation of a representation dispute among employees of a carrier:

(a) For a period of two (2) years from the date of a certification covering the same craft or class of employees on the same carrier, and

(b) For a period of one (1) year from the date on which:

(1) The Board dismissed a docketed application after having conducted an election among the same craft or class of employees on the same carrier and less than a majority of eligible voters particpated in the election; or

(2) The Board dismissed a docketed application covering the same craft or class of employees on the same carrier because no dispute existed as defined in § 1206.2 of these Rules; or

(3) The Board dismissed a docketed application after the applicant withdrew an application covering the same craft or class of employees on the same carrier after the application was docketed by the Board.

[44 FR 10602, Feb. 22, 1979]

§ 1206.5 Necessary evidence of intervenor's interest in a representation dispute.

In any representation dispute under the provisons of section 2, Ninth, of the Railway Labor Act, an intervening individual or organization must produce proved authorization from at least thirty-five (35) percent of the craft or class of employees involved to warrant placing the name of the intervenor on the ballot.

§ 1206.6 Eligibility of dismissed employees to vote.

Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis.

§ 1206.7 Construction of this part.

The rules and regulations in this part shall be liberally construed to effectuate the purposes and provisions of the act.

§ 1206.8 Amendment or recission of rules in this part.

(a) Any rule or regulation in this part may be amended or rescinded by the Board at any time.

(b) Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation in this part. An original and three copies of such petition shall be filed with the Board in Washington, D.C., and shall state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

(c) Upon the filing of such petition, the Board shall consider the same, and may thereupon either grant or deny the petition in whole or in part, conduct an appropriate hearing thereon and make other disposition of the petition. Should the petition be denied in whole or in part, prompt notice shall be given of the denial, accompanied by a simple statement of the grounds unless the denial is self-explanatory.

PART 1207—ESTABLISHMENT OF SPECIAL ADJUSTMENT BOARDS

Sec.

1207.1 Establishment of special adjustment boards [PL Boards].
1207.2 Requests for Mediation Board action.
1207.3 Compensation of neutrals.
1207.4 Designation of PL Boards, filing of agreements, and disposition of records.

AUTHORITY: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

SOURCE: 31 FR 14644, Nov. 17, 1966, unless otherwise noted.

§ 1207.1 Establishment of special adjustment boards (PL Boards).

Pub. L. 89-456 [80 Stat. 208] governs procedures to be followed by carriers and representatives of employees in the establishment and functioning of special adjustment boards, hereinafter referred to as PL Boards. Pub. L. 89-456 requires action by the National Mediation Board in the following circumstances:

(a) *Designation of party member of PL Board.* Pub. L. 89-456 provides that within thirty (30) days from the date a written request is made by an employee representative upon a carrier, or by a carrier upon an employee representative, for the establishment of a PL Board, an agreement establishing such a Board shall be made. If, however, one party fails to designate a member of the Board, the party making the request may ask the Mediation Board to designate a member on behalf of the other party. Upon receipt of such request, the Mediation Board will notify the party which failed to designate a partisan member for the establishment of a PL Board of the receipt of the request. The Mediation Board will then designate a representative on behalf of the party upon whom the request was made. This representative will be an individual associated in interest with the party he is to represent. The designee, together with the member appointed by the party requesting the establishment of the PL Board, shall constitute the Board.

(b) *Appointment of a neutral to determine matters concerning the establishment and/or jurisdiction of a PL Board.* (1) When the members of a PL Board constituted in accordance with paragraph (a) of this section, for the purpose of resolving questions concerning the establishment of the Board and/or its jurisdiction, are unable to resolve these matters, then and in that event, either party may ten (10) days thereafter request the Mediation Board to appoint a neutral member to determine these procedural issues.

(2) Upon receipt of this request, the Mediation Board will notify the other party to the PL Board. The Mediation Board will then designate a neutral

member to sit with the PL Board and resolve the procedural issues in dispute. When the neutral has determined the procedural issues in dispute, he shall cease to be a member of the PL Board.

(c) *Appointment of neutral to sit with PL Boards and dispose of disputes.* (1) When the members of a PL Board constituted by agreement of the parties, or by the appointment of a party member by the Mediation Board, as described in paragraph (a) of this section, are unable within ten (10) days after their failure to agree upon an award to agree upon the selection of a neutral person, either member of the Board may request the Mediation Board to appoint such neutral person and upon receipt of such request, the Mediation Board shall promptly make such appointment.

(2) A request for the appointment of a neutral under paragraph (b) of this section or this paragraph (c) shall;

(i) Show the authority for the request—Pub. L. 89-456, and

(ii) Define and list the proposed specific issues or disputes to be heard.

§ 1207.2 Requests for Mediation Board action.

(a) Requests for the National Mediation Board to appoint neutrals or party representatives should be made on NMB Form 5.

(b) Those authorized to sign request on behalf on parties:

(1) The "representative of any craft or class of employees of a carrier," as referred to in Pub. L. 89-456, making request for Mediation Board action, shall be either the General Chairman, Grand Lodge Officer (or corresponding officer of equivalent rank), or the Chief Executive of the representative involved. A request signed by a General Chairman or Grand Lodge Officer (or corresponding officer of equivalent rank) shall bear the approval of the Chief Executive of the employee representative.

(2) The "carrier representative" making such a request for the Mediation Board's action shall be the highest carrier officer designated to handle matters arising under the Railway Labor Act.

(c) Docketing of PL Board agreements: The National Mediation Board will docket agreements establishing PL Board, which agreements meet the requirements of coverage as specified in Pub. L. 89-456. No neutral will be appointed under § 1207.1(c) until the agreement establishing the PL Board has been docketed by the Mediation Board.

§ 1207.3 Compensation of neutrals.

(a) *Neutrals appointed by the National Mediation Board.* All neutral persons appointed by the National Mediation Board under the provisions of § 1207.1 (b) and (c) will be compensated by the Mediation Board in accordance with legislative authority. Certificates of appointment will be issued by the Mediation Board in each instance.

(b) *Neutrals selected by the parties.* (1) In cases where the party members of a PL Board created under Pub. L. 89-456 mutually agree upon a neutral person to be a member of the Board, the party members will jointly so notify the Mediation Board, which Board will then issue a certificate of appointment to the neutral and arrange to compensate him as under paragraph (a) of this section.

(2) The same procedure will apply in cases where carrier and employee representatives are unable to agree upon the establishment and jurisdiction of a PL Board, and mutually agree upon a procedural neutral person to sit with them as a member and determine such issues.

§ 1207.4 Designation of PL Boards, filing of agreements, and disposition of records.

(a) *Designation of PL Boards.* All special adjustment boards created under Pub. L. 89-456 will be designated PL Boards, and will be numbered serially, commencing with No. 1, in the order of their docketing by the National Mediation Board.

(b) *Filing of agreements.* The original agreement creating the PL Board under Public Law 89-456 shall be filed with the National Mediation Board at the time it is executed by the parties. A copy of such agreement shall be filed by the parties with the Administrative Officer of the National Railroad Adjustment Board, Chicago, Ill.

(c) *Disposition of records.* Since the provisions of section 2(a) of Public Law 89-456 apply also to the awards of PL Boards created under this Act, two copies of all awards made by the PL Boards, together with the record of proceedings upon which such awards are based, shall be forwarded by the neutrals who are members of such Boards, or by the parties in case of disposition of disputes by PL Boards without participation of neutrals, to the Administrative Officer of the National Railroad Adjustment Board, Chicago, Ill., for filing, safekeeping, and handling under the provisions of section 2(q), as may be required.

PART 1208—AVAILABILITY OF INFORMATION

Sec.

1208.1 Purpose.
1208.2 Production or disclosure of material or information.
1208.3 General policy.
1208.4 Material relating to representation function.
1208.5 Material relating to mediation function—confidential.
1208.6 Fees—duplication costs and search.
1208.7 Compliance with subpoenas.

AUTHORITY: 44 Stat. 577, as amended; 45 U.S.C. 151-163.

SOURCE: 39 FR 1751, Jan. 14, 1974, unless otherwise noted.

§ 1208.1 Purpose.

The purpose of this part is to set forth the basic policies of the National Mediation Board and the National Railroad Adjustment Board in regard to the availability and disclosure of information in the possession of the NMB and the NRAB.

§ 1208.2 Production or disclosure of material or information.

(a) *Requests for identifiable records and copies.* (1) All requests for National Mediation Board records shall be filed in writing by mailing the request or delivering it to the Executive Secretary, National Mediation Board, Washington, D.C. 20572, except that requests for records of the National Railroad Adjustment Board shall be in writing and addressed to the Administrative Officer, National Railroad Adjustment Board, 220 South State Street, Chicago, Illinois 60604.

(2) The request shall reasonably describe the records being sought in a manner which permits identification and location of the records.

(i) If the description is insufficient to locate the records, the National Mediation Board will so notify the person making the request and indicate the additional information needed to identify the records requested.

(ii) Every reasonable effort shall be made by the Board to assist in the identification and location of the records sought.

(3) Upon receipt of a request for records the Executive Secretary shall maintain records in reference thereto which shall include the date and time received, the name and address of the requester, the nature of the records requested, the action taken, the date the determination letter is sent to the requester, appeals and action thereon, the date any records are subsequently furnished, the number of staff hours and grade levels of persons who spent time responding to the request and the payment requested and received.

(4) All time limitations established pursuant to this section with respect to processing initial requests and appeals shall commence at the time a written request for records is received at the Board's offices in Washington, D.C., except for requests directed to the National Railroad Adjustment Board pursuant to § 1208.2(a)(1) in which case the time limit shall commence when the request is received at the NRAB's office in Chicago.

(i) An oral request for records shall not begin any time requirement.

(b) *Processing the Initial Request.* (1) Time limitations. Within 10 working days (excepting Saturdays, Sundays, and working holidays) after a request for records is received, the Executive Secretary shall determine and inform the requester by letter whether or the extent to which the request will be complied with, unless an extension is taken under paragraph (b)(3) of this section.

(2) Such reply letter shall include:

(i) A reference to the specific exemption or exemptions under the Freedom of Information Act authorizing the withholding of the record, a brief explanation of how the exemption applies to the record withheld.

(ii) The name or names and positions of the person or persons, other than the Executive Secretary, responsible for the denial.

(iii) A statement that the denial may be appealed within thirty days by writing to the Chairman, National Mediation Board, Washington, D.C. 20572, and that judicial review will thereafter be available in the district in which the requester resides, or has his principal place of business, or the district in which the agency records are situated, or the District of Columbia.

(3) Extension of time. In unusual circumstances as specified in this paragraph, the Executive Secretary may extend the time for initial determination on requests up to a total of ten days (excluding Saturdays, Sundays, and legal public holidays). Extensions shall be granted in increments of five days or less and shall be made by written notice to the requester which sets forth the reason for the extension and the date on which a determination is expected to be dispatched. As used in this paragraph "unusual circumstances" means, but only to the extent necessary to the proper processing of the request:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency or another division having substantial interest in the determination of the request, or the need for consultation among components of the agency having substantial subject matter interest therein.

(4) Treatment of delay as a denial. If no determination has been dispatched at the end of the ten-day period, or the last extension thereof, the requester may deem his request denied, and exercise a right of appeal, in accordance with § 1208.2(c). When no determination can be dispatched within the applicable time limit, the responsible official shall nevertheless continue to process the request; on expiration of the time limit he shall inform the requester of the reason for the delay, of the date on which a determination may be expected to be dispatched, and of his right to treat the delay as a denial and to appeal to the Chairman of the Board in accordance with § 1208.2(c) and he may ask the requester to forego appeal until a determination is made.

(c) *Appeals to the Chairman of the Board.* (1) When a request for records has been denied in whole or in part by the Executive Secretary or other person authorized to deny requests, the requester may, within thirty days of its receipt, appeal the denial to the Chairman of the Board. Appeals to the Chairman shall be in writing, addressed to the Chairman, National Mediation Board, Washington, D.C. 20572.

(2) The Chairman of the Board will act upon the appeal within twenty working days (excluding Saturdays, Sundays and legal public holidays) of its receipt unless an extension is made under paragraph (c)(3) of this section.

(3) In unusual circumstances as specified in this paragraph, the time for action on an appeal may be extended up to ten days (excluding Saturdays, Sundays and legal public holidays) minus any extension granted at the initial request level pursuant to § 1208.2(b)(3). Such extension shall be made by written notice to the requester which sets forth the reason for the extension and the date on which a determination is expected to be dispatched. As used in this paragraph "unusual circumstances" means, but only to the extent necessary to the proper processing of the appeal:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency or another division having substantial interest in the determination of the request or the need for consultation among components of the agency having substantial subject matter interest therein.

(4) Treatment of delay as a denial. If no determination on the appeal has been dispatched at the end of the twenty-day period or the last extension thereof, the requester is deemed to have exhausted his administrative remedies, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be dispatched within the applicable time limit, the appeal will nevertheless continue to be processed; on expiration of the time limit the requester shall be informed of the reason for the delay, of the date on which a determination may be expected to be dispatched, and of his right to seek judicial review in the United States district court in the district in which he resides or has his principal place of business, the district in which the Board records are situated or the District of Columbia. The requester may be asked to forego judicial review until determination of the appeal.

(d) *Indexes of Certain Records.* (1) The National Mediation Board at its office in Washington, D.C. will maintain, make available for public inspection and copying, and publish quarterly (unless the Board determines by order published in the FEDERAL REGISTER that such publication would be unnecessary or impracticable) a current index of the materials available at the Board offices which are required to be indexed by 5 U.S.C. 552(a)(2).

(i) A copy of such index shall be available at cost from the National Mediation Board, Washington, D.C. 20572.

(2) The National Railroad Adjustment Board at its offices in Chicago, Illinois will maintain, make available for public inspection and copying, and publish quarterly (unless the Board determines by order published in the FEDERAL REGISTER that such publication would be unnecessary or impracticable) a current index of the materials available at the Board offices which are required to be indexed by 5 U.S.C. 552(a)(2).

[42 FR 43627 Aug. 30, 1977]

§ 1208.3 General policy.

(a) Public policy and the successful effectuation of the NMB's mission require that Board members and the employees of the NMB maintain a reputation for impartiality and integrity. Labor and management and other interested parties participating in mediation efforts must have assurance, as must labor organizations and individuals involved in questions of representation, that confidential information disclosed to Board members and employees of the NMB will not be divulged, voluntarily or by compulsion.

(b) Notwithstanding this general policy, the Board will under all circumstances endeavor to make public as much information as can be allowed.

§ 1208.4 Material relating to representation function.

(a) The documents constituting the record of a case, such as the notices of hearing, motions, rulings, orders, stenographic reports of the hearings, briefs, exhibits, findings upon investigation, determinations of craft or class, interpretations, dismissals, withdrawals, and certifications, are matters of official record and are available for inspection and examination during the usual business hours at the Board's offices in Washington.

(b) This part notwithstanding, the Board will treat as confidential the evidence submitted in connection with a representation dispute and the investigatory file pertaining to the representation function.

§ 1208.5 Material relating to mediation function—confidential.

(a) All files, reports, letters, memoranda, documents, and papers (hereinafter referred to as confidential documents) relating to the mediation function of the NMB, in the custody of the

NMB or its employees relating to or acquired in their mediatory capacity under any applicable section of the Railway Labor Act of 1926, as amended, are hereby declared to be confidential. No such confidential documents or the material contained therein shall be disclosed to any unauthorized person, or be taken or withdrawn, copied or removed from the custody of the NMB or its employees by any person or by any agent of such person or his representative without the explicit consent of the NMB.

(b) However, the following specific documents: Invocation or proffer of mediation, the reply or replies of the parties, the proffer of arbitration and replies thereto, and the notice of failure of mediatory efforts in cases under section 5, First of the Railway Labor Act, as amended, are matters of official record and are available for inspection and examination.

(c) Interpretations of mediation agreements by the NMB, arising out of section 5, Second, of the Railway Labor Act, as amended, are public records and are therefore open for public inspection and examination.

§ 1208.6 Fees—duplication costs and search.

(a)(1) Unless waived in accordance with the provisions of § 1208.62, the following fees shall be imposed for the reproduction of any record disclosed pursuant to this part.

(i) *Copying of records.* Fifteen cents per copy of each page.

(ii) *Copying of microfilm.* Fifty cents per microfilm frame.

(iii) *Clerical searches.* $1.80 for each one quarter hour spent by clerical personnel searching for and producing a requested record, including time spent copying any record.

(iv) *Non-clerical searches.* $4.10 for each one quarter hour spent by professional or managerial personnel searching for and producing a requested record, including time spent copying any record.

(v) *Certification or authentication of records.* $1.00 per certification or authentication.

(vi) *Forwarding material to destination.* Postage, insurance and special fees will be charged on an actual cost basis.

(2)(i) No charge shall be assessed for time spent in resolving legal or policy questions relating to the documents or in examining records for the purpose of deleting nondisclosable portions thereof.

(ii) No charge shall be assessed for time spent in monitoring an individual who examines documents at the Board's offices.

(3) Payment shall be made by check or money order payable to "United States Treasury."

(b)(1) No fee shall be charged for disclosure of records pursuant to this part where:

(i) The cost of providing the records is less than $5.00.

(ii) The records are requested by a congressional committee or subcommittee, a Federal court, a Federal department or agency, or the General Accounting Office.

(2)(i) The Executive Secretary may waive payment of fees, in whole or in part, when he determines that the person making the request is indigent.

(ii) A person seeking such a determination shall petition the Executive Secretary in writing stating the reasons therefore.

(iii) Determinations made pursuant to this provision will be made within the discretion of the agency.

(3)(i) The Executive Secretary may reduce or waive payment of fees in whole or in part when he determines that such reduction or waiver is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(ii) Determinations pursuant to this provision shall be made within the discretion of the agency.

(4) No fee shall be charged if a record requested is not found or for any record that is determined to be totally exempt from disclosure.

[42 FR 43628, Aug. 30, 1977]

§ 1208.7 Compliance with subpoenas.

(a) No person connected in any official way with the NMB shall produce or present any confidential records of the Board or testify on behalf of any party to any cause pending in any court, or before any board, commission, committee, tribunal, investigatory body, or administrative agency of the U.S. Government, or any State or Territory of the United States, or the District of Columbia, or any municipality with respect to matters coming to his knowledge in his official capacity or with respect to any information contained in confidential documents of the NMB, whether in answer to any order, subpoena, subpoena duces tecum, or otherwise without the express written consent of the Board.

(b) Whenever any subpoena or subpoena duces tecum calling for confidential documents, or the information contained therein, or testimony as described above shall have been served on any such person, he will appear in answer thereto, and unless otherwise expressly permitted by the Board, respectfully decline, by reason of this section, to produce or present such confidential documents or to give such testimony.

PART 1209—PUBLIC OBSERVATION OF NATIONAL MEDIATION BOARD MEETINGS

Sec.

1209.01 Scope and purpose.
1209.02 Definitions.
1209.03 Conduct of National Mediation Board business.
1209.04 Open meetings.
1209.05 Closing of meetings; reasons therefor.
1209.06 Action necessary to close meetings; record of votes.
1209.07 Notice of meetings; public announcement and publication.
1209.08 Transcripts, recordings or minutes of closed meetings; retention; public availability.
1209.09 Requests for records under Freedom of Information Act.
1209.10 Capacity of public observers.

AUTHORITY: 5 U.S.C. 552b(g), 44 Stat. 577, as amended (45 U.S.C. 151 et seq.)

SOURCE: 42 FR 60739, Nov. 29, 1977, unless otherwise noted.

§ 1209.01 Scope and purpose.

(a) The provisions of this part are intended to implement the requirements of section 3(a) of the Government in the Sunshine Act, 5 U.S.C. 552b.

(b) It is the policy of the National Mediation Board that the public is entitled to the fullest practicable information regarding its decisionmaking processes. It is the purpose of this part to provide the public with such information while protecting the rights of individuals and the ability of the agency to carry out its responsibilities.

§ 1209.02 Definitions.

For purposes of this part:

(a) The terms "Board" or "Agency" mean the National Mediation Board, a collegial body composed of three members appointed by the President with the advice and consent of the Senate.

(b) The term "meeting" means the deliberations of at least two members of the Board where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted or with respect to any information proposed to be withheld under by 5 U.S.C. 552b(d) or (e)/5 U.S.C. 552b(c).

§ 1209.03 Conduct of National Mediation Board business.

Members shall not jointly conduct or dispose of agency business other than in accordance with this part.

§ 1209.04 Open meetings.

Every portion of every Board meeting shall be open to public observation except as otherwise provided by § 1209.05 of this part.

§ 1209.05 Closing of meetings; reasons therefor.

(a) Except where the Board determines that the public interest requires otherwise, meetings, or portions thereof, shall not be open to public observation where the deliberations concern the issuance of a subponea, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct or disposition by the Board of any matter involving a determination on the record after opportunity for a hearing, or any court proceeding collateral or ancillary thereto.

(b) Except where the Board determines that the public interest requires otherwise, the Board also may close meetings, or portions thereof, when the deliberations concern matters or information falling within the scope of 5 U.S.C. 552b (c)(1) (secret matters concerning national defense or foreign policy); (c)(2) (internal personnel rules and practices); (c)(3) (matters specifically exempted from disclosure by statute); (c)(4) (trade secrets and commercial or financial information obtained from a person and privileged or confidential); (c)(5) (matters of alleged criminal conduct or formal censure); (c)(6) (personal information where disclosure would cause a clearly unwarranted invasion of personal privacy); (c)(7) (certain materials or information from investigatory files compiled for law enforcement purposes); or (c)(9)(B) (disclosure would significantly frustrate implementation of a proposed agency action).

§ 1209.06 Action necessary to close meetings; record of votes.

A meeting shall be closed to public observation under § 1209.05, only when a majority of the members of the Board who will participate in the meeting vote to take such action.

(a) When the meeting deliberations concern matters specified in § 1209.05(a), the Board members shall vote at the beginning of the meeting, or portion thereof, on whether to close such meeting, or portion thereof, to public observation, and on whether the public interest requires that a meeting which may properly be closed should nevertheless be open to public observation A record of such vote, reflecting the vote of each member of the Board, shall be kept and made available to the public at the earliest practicable time.

(b) When the meeting deliberations concerns matters specified in § 1209.05(b), the Board shall vote on whether to close such meeting, or portion thereof, to public ovservation, and on whether the public interest requires that a meeting which may properly be closed should nevertheless be open to public observation. The vote shall be taken at a time sufficient to permit inclusion of information concerning the open or closed status of the meeting in the public announcement thereof. A single vote may be taken with respect to a series of meetings at which the deliberations will concern the same particular matters where subsequent meetings in the series are scheduled to be held within one day after the vote is taken.

(c) Whenever any person whose interests may be directly affected by deliberations during a meeting, or a portion thereof, requests that the Board close that meeting, or portion thereof, to public observation for any of the reasons specified in 5 U.S.C. 552b(c)(5) (matters of alleged criminal conduct or formal censure), (c)(6) (personal information where disclosure would cause a clearly unwarranted invasion of personal privacy), or (c)(7) (certain materials or information from investigatory files compiled for law enforcement purposes), the Board members participating in the meeting upon request of any one member of the Board, shall vote on whether to close such meeting, or any portion thereof, for that reason. A record of such vote, reflecting the vote of each member of the Board participating in the meeting, shall be kept and made available to the public within one day after the vote is taken.

(d) After public announcement of a meeting as provided in § 1209.07 of this part, a meeting, or portion thereof, announced as closed may be opened or a meeting, or portion thereof, announced as open may be closed, only if a majority of the members of the Board who will participate in the meeting determine by a recorded vote that Board business so requires and that an earlier announcement of the change was not possible. The change made and the vote of each member on the change shall be announced publicly at the earliest practicable time.

(e) Before a meeting may be closed pursuant to § 1209.05 the General Counsel of the Board shall certify that in his or her opinion the meeting may properly be closed to public observation. The certification shall set forth each applicable exemptive provision for such closing. The certification shall be retained by the agency and made publicly available as soon as practicable.

§ 1209.07 Notice of meetings; public announcement and publication.

(a) A public announcement setting forth the time, place and subject matter of meetings or portions thereof closed to public observation pursuant to the provisions of § 1209.05(a) of this part, shall be made at the earaliest practicable time.

(b) Except for meetings closed to public observation pursuant to the provisions of § 1209.05(a) of this part, the agency shall make public announcement of each meeting at least 7 days before the scheduled date of the meeting. The announcement shall specify the time, place and subject matter of the meeting, whether it is to be open to public observation or closed, and the name, address and phone number of an agency official designated to respond to requests for information about the meeting. The 7 day period for advance notice may be shortened only upon a determination by a majority of the members of the Board who will participate in the meeting that agency business requires that such meeting be called at an earlier date, in which event the public announcement shall be made at the earliest practicable time. A record of the vote to schedule a meeting at an earlier date shall be kept and made available to the public.

(c) Within one day after a vote to close a meeting, or any portion thereof, pursuant to the provisions of § 1209.05(b) of this part, the agency shall make publicly available a full written explanation of its action closing the meeting, or portion thereof, together with a list of all persons expected to attend the meeting and their affiliation.

(d) If after a public announcement required by paragraph (b) of this section has been made, the time and place of the meeting are changed, a public announcement of such changes shall be made at the earliest practicable time. The subject matter of the meeting may be changed after public annmouncment thereof only if a majority of the members of the Board who will participate in the meeting determine that agency business so requires and that no earlier announcement of the change was possible. When such a change in subject matter is approved a public announcement of the change shall be made at the earliest practicable time. A record of the vote to change the subject matter of the meeting shall be kept and made available to the public.

(e) All announcements or changes thereof issued pursuant to the provisions of paragraphs (b) and (d) of this section, or pursuant to the provisions of § 1209.06(d), shall be submitted for publication in the FEDERAL REGISTER immediately following their release to the public.

(f) Announcement of meeting made pursuant to the provisions of this section shall be posted on a bulletin board maintained for such purpose at the Board's offices, 1425 K Street, N.W., Washington, D.C Interested individuals or organizations may request the Executive Secretary, National Medication Board, Washington, D.C. 20572 to place them on a mailing list for receipt of such announcements.

§ 1209.08 Transcripts, recordings or minutes of closed meetings; retention; public availability.

(a) For every meeting or portion thereof closed under the provisions of § 1209.05, the presiding officer shall prepare a statement setting forth the time and place of the meeting and the persons present, which statement shall be retained by the agency. For each such meeting or portion thereof there also shall be maintained a complete transcript or electronic recording of the proceedings, except that for meetings closed pursuant to § 1209.05(a) the Board may, in lieu of a transcript or electronic recording, maintain a set of minutes fully and accurately summarizing any action taken, the reason therefor and views thereof, documents considered, and the members' vote on each roll call vote.

(b) The agency shall maintain a complete verbatim transcript, a complete electronic recording, or a complete set of minutes for each meeting or portion thereof closed to public observation, for a period of at least one year after the close of the agency proceeding of which the meeting was a part, but in no event for a period of less than two years after such meeting.

(c) The agency shall make promptly available to the public copies of transcripts, electronic recordings or minutes maintained as provided in paragraphs (a) and (b) of this section, except to the extent the items therein contain information which the agency determines may be withheld pursuant to the provisions of 5 U.S.C. 552b(c).

(d) Upon request in accordance with the provisions of this paragraph and except to the extent they contain information which the agency determines may be withheld pursuant to the provisions of 5 U.S.C. 552b(c), copies of transcripts or minutes, or transcriptions of electronic recordings including the identification of speakers, shall be furnished subject to the payment of duplication costs in accordance with the schedule of fees set forth in § 1208.06 of the Board's Rules, and the actual cost of transcription. Requests for copies of transcripts or minutes, or transcriptions of electronic recordings of Board meetings shall be directed to the Executive Secretary, National Mediation Board, Washington, D.C. 20572. Such requests shall reasonably identify the records sought and include a statement that whatever costs are involved in furnishing the records will be acceptable or, alternatively, that costs will be acceptable up to a specified amount. The Board may determine to require prepayment of such costs.

§ 1209.09 Requests for records under Freedom of Information Act.

Requests to review or obtain copies of agency records other than notices or records prepared under this part may be pursued in accordance with the Freedom of Information Act (5 U.S.C. 552). Part 1208 of the Board's Rules addresses the requisite procedures under that Act.

§ 1209.10 Capacity of public observers.

The public may attend open Board meetings for the sole purpose of observation. Observers may not participate in meetings unless expressly invited or otherwise interfere with the conduct and disposition of agency business. When a portion of a meeting is closed to the public, observers will leave the meeting room upon request to enable discussion of the exempt matter therein under consideration.

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CHAPTER XII—FEDERAL MEDIATION AND CONCILIATION SERVICE

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PART 1400—STANDARDS OF CONDUCT, RESPONSIBILITIES, AND DISCIPLINE

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APPENDIX—CODE OF PROFESSIONAL CONDUCT FOR LABOR MEDIATORS

AUTHORITY: E.O. 11222 of May 8, 1965, 30 FR 6469, 3 CFR, 1965 Supp.; 5 CFR 735.104.

SOURCE: 33 FR 5765, Apr. 13, 1968, unless otherwise noted.

Subpart A—General

§ 1400.735-1 Introduction.

(a) This part establishes a revised code of conduct, ethics, and responsibilities for all employees of the Service.

(b) The maintenance of high moral and ethical standards in the public service is essential both to efficiency in the conduct of Government business and to assuring the confidence of the public in their Government. Unwavering integrity and standards of behavior that reflect credit on the Government are required. The nature of Service operations requires that such a high standard of personal integrity and conduct must be established for and adhered to by its employees.

(c) The elimination of conflicts of interest and apparent conflicts of interest in the Federal service is one of the most important objectives in establishing general standards of conduct. A conflict of interest situation may be defined as one in which a Federal employee's private interest, usually of an economic nature, conflicts or raises a reasonable question of conflict with his public duties and responsibilities. The potential conflict is of concern whether it is real or only apparent. In this part are listed some of the kinds of conduct or activity prohibited or restricted by law, regulation, or commonly accepted standards of good conduct. These prohibitions are not all-inclusive; in addition, employees should refrain from any action prejudicial to the best interests of the Service.

(d) The failure of an employee to observe the basic principles of good conduct, ethics, and integrity will result in immediate remedial, adverse or disciplinary action of a severity in keeping with the offense committed and in accordance with equitable administrative practice. The regulations in this part covering Employees of the Service and special Government employees are established in conformity with Part 735 of the Civil Service Regulations, 5 CFR Part 735.

§ 1400.735-2 Definitions.

(a) "Executive Order" means Executive Order 11222 of May 8, 1965 (3 CFR, 1964-1965 Comp., p. 306).

(b) "Person" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

(c) "Employee" means an officer or employee of the Service, but does not include a special Government employee.

(d) "Special Government employee" means a person appointed by the Service to a position as defined in FPM 735, Appendix C, and FPM 304-3.

§ 1400.735-3 Advice and counseling service.

The Director will designate a counselor for the Service on all matters relating to the conduct and responsibilities of employees, and special Government employees, under the Executive order. The counselor is responsible for providing individual employees with interpretations on questions of conflicts of interest, and other matters covered by this part. (Due to the small size of the Federal Mediation and Conciliation Service, it is unrealistic to designate deputy counselors, and therefore, all questions concerning matters covered in this part should be directed to the one counselor appointed by the Director.)

Subpart B—Employees: Ethical and Other Conduct and Responsibilities

§ 1400.735-10 Proscribed actions.

An employee shall avoid any action whether or not specificially prohibited by this part which might result in or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government.

§ 1400.735-11 Gifts, entertainment, and favors.

(a) Except as provided in paragraph (b) of this section, an employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has, or is seeking to obtain, contractual or other business of financial relations with the Federal Mediation and Conciliation Service;

(2) Conducts operations or activities that are affected by Federal Mediation and Conciliation Service functions; or

(3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

(b) Exceptions may be necessary and appropriate in view of the nature of the Federal Mediation and Conciliation Service work, and the duties and responsibilities of its employees. Appropriate exceptions are those that:

(1) Govern obvious family or personal relationships (such as those between the parents, children, or spouse of the employee and the employee) when the circumstances make it clear that those relationships rather than the business of the persons concerned are the motivating factors;

(2) Permit acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting, or other meeting, or an inspection tour where an employee may properly be in attendance;

(3) Permit acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans; and

(4) Permit acceptance of unsolicited advertising or promotional material such as pens, pencils, note pads, calendars, and other items of nominal intrinsic value.

(c) An employee shall not solicit contributions from another employee for a gift to an employee in a superior official position. An employee in a superior official position shall not accept a gift presented as a contribution from employees receiving less salary than himself. An employee shall not make a donation as a gift to an employee in a superior official position (5 U.S.C. 7351). However, this paragraph does not prohibit a voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness, or retirement.

(d) An employee shall not accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided by the Constitution and in 5 U.S.C. 7342.

§ 1400.735-12 Outside employment, business activities, or interests (paid or unpaid).

(a) *Outside employment.* (1) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment.

(2) Neither outside employment limitations in paragraph (a) (1) of this section nor the provisions of § 1400.735-11 preclude an employee from;

(i) Receipt of a bona fide reimbursement, unless prohibited by law, for actual expenses for travel and such other necessary subsistence as is compatible with this part for which no Government payment or reimbursement is made. However, this paragraph does not allow an employee to be reimbursed, or payment to be made on his behalf, for excessive personal living expenses, gifts, entertainment, or other personal benefits, nor does it allow an employee to be reimbursed by a person for travel on official business under agency order.

(ii) Participation in the acitivities of national or State political parties not prohibited by law.

(iii) Participation in the affairs of, or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service, or civic organization.

(3) Incompatible activities referred to in paragraph (a)(1) of this section include, but are not limited to:

(i) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interests; or

(ii) Outside employment if it is determined that engaging in the proposed outside activity might:

(*a*) Influence or conflict with the employee's decisions or actions in planning, interpreting, or executing policies, programs, and work assignments of the Service;

(*b*) Injure relations of the Service with the public;

(*c*) Impair the employee's physical capacity to render proper and efficient service at all times;

(*d*) Interfere with the impartial performance or jeopardize acceptability of the employee in his work;

(*e*) Conflict with the employee's normal office hours, including an allowance for sufficient time for travel to place of outside employment or activity. (Normal office hours will be considered as those which are established for the specific office in which the employee works.) In the absence of extenuating circumstances, approval generally will not be granted where the outside activity requires presence of the employee prior to 6 p.m.

NOTE: Teaching activities are not approved automatically, but rather on the basis of time required, appropriate subject matter, etc.

(4) The Service, as a matter of policy, does not look upon any outside employment or business activity, including concurrent employment by the Federal Mediation and Conciliation Service and any other Governmental political subdivision or agency,

as being consistent with the best interests of the Service.

(5) Employees may not engage in any outside employment, including teaching, lecturing, or writing, which might reasonably result in a conflict of interest, or an apparent conflict of interest, between the private interests of the employee and his official government duties and responsibilities. No employee shall directly or indirectly accept, engage in, or continue in any outside employment or business activity, full- or part-time, paid or unpaid, without advance written approval (including teaching or lecturing).

(b) *Private compensation.* An employee shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Government (18 U.S.C. 209).

(c) *Teaching, writing and lecturing.* (1) Teaching, writing and lecturing by Federal employees are generally to be encouraged so long as the laws, general standards, and regulations pertaining to conflicts of interest and the standards and regulations in this part applying to outside employment are observed. Teaching commitments will generally be limited to one class, course, or assignment during a concurrent period. These activities frequently serve to enhance the employee's value to the Service, as well as to increase the spread of knowledge and information in our society. Such activities, if remuneration is anticipated, must not be dependent on information obtained as a result of the employee's official government position if such information is not available to others, at least on request.

(2) This provision does not, of course, prevent the Director from authorizing an employee to base his writings or lectures on nonpublic materials in the Federal Mediation and Conciliation Service files (not involving national security) when this will be done in the public interest. Personal research relating to mediation, collective bargaining and labor management relations is encouraged as a progressive step in self-development. The writing of articles in this area, which may be released or submitted for publication, is also encouraged. Research and writing are not considered official activity, and therefore may not be undertaken on duty time; and the author may receive compensation for publication thereof. Advance approval by the Director, before undertaking the research or writing, is not required. However, when such research is undertaken, or such article is being written on the basis of an official assignment, the work will be performed on duty time and the product will be the property of the Service.

(3) If any type of article, when published or released, will identify the author in any manner as an employee of the Service, such identification necessarily implies that the article reflects either the official policy or the philosophies of the Service. For that reason, it must be submitted to the Director before release or publication, or it must contain a disclaimer phrase to the effect that the article or statement does not necessarily reflect the official policy or philosophies of the Service.

(d) *Procedure for approval of outside employment or teaching.* Clerical and administrative employees' approval for outside activity shall be in writing and may be granted by the Regional Director, if a regional employee, or by the Director of Administrative Management, if a national office employee. Approval for such outside activity for all other employees of the Service shall be granted by the Director or his designee. Requests for approval shall be made in writing through the employee's supervisor and must contain the following:

(1) The name and address of the employer or business activity;

(2) The exact nature of the work or employment;

(3) Working hours.

§ 1400.735-13 Financial interest and responsibilities.

(a) An employee shall not:

(1) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his Government duties and responsibilities; or

(2) Engage in, directly or indirectly, a financial transaction as result of, or primarily relying on, information obtained through his Government employment.

(b) This section does not preclude an employee from having a financial interest or engaging in financial transactions to the same extent as a private citizen not employed by the Government so long as it is not prohibited by law, the Executive Order, or the regulations in this part.

§ 1400.735-14 Use of Government property.

An employee shall not, directly or indirectly, use, or allow the use of Government property of any kind, including property leased to the Government, for other than official approved activities. An employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him.

§ 1400.735-15 Misuse of information.

For the purpose of furthering a private interest, an employee shall not, except as provided in § 1400.735-12(c) directly or indirectly use, or allow the use of, official information obtained through or in connection with his Government employment, which has not been made available to the general public.

§ 1400.735-16 Indebtedness.

An employee shall pay each just financial obligation in a proper and timely manner, especially one imposed by law such as Federal, State or local taxes. For the purposes of this part, a "just financial obligation" means one acknowledged by the employee or reduced to judgment by a court, and "in a proper and timely manner" means in a manner which the agency determines does not, under the circumstances, reflect adversely on the Government as his employer. In the event of dispute between an employee and an alleged creditor, the Service is not required to determine the validity or amount of the disputed debt.

§ 1400.735-17 Gambling, betting, and lotteries.

An employee shall not participate while on Government owned or leased property, or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket.

§ 1400.735-18 General conduct prejudicial to the Government.

An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

§ 1400.735-19 Influencing Members of Congress.

No money appropriated to the Service shall be used by any employee of the Service to pay for any personal service, printed or written matter, or other devices intended to influence any Member of Congress regarding any legislation or appropriation before the Congress.

§ 1400.735-20 Code of Professional Conduct for Labor Mediators.

In 1964, a Code of Professional Conduct for Labor Mediators was drafted by a Federal-State Liaison Committee and approved by the Service and the Association of Labor Mediation Agencies at its annual meeting. It is expected that mediators in the Federal Mediation and Conciliation Service will make themselves familiar with this Code and will conduct themselves in accordance with the responsibilities outlined therein. The complete narrative of the Code appears in the appendix to this part.

§ 1400.735-21 Miscellaneous statutory provisions.

Each employee shall acquaint himself with the statutes that relate to his ethical and other conduct as an employee of the Federal Mediation and Conciliation Service and of the Government. The attention of all employees is directed to the following statutory provisions and to the accompanying chart of penalties and statutory references:

(a) House Concurrent Resolution 175, 85th Congress, 2d session, 72 Stat. B12, the "Code of Ethics for Government Service."

(b) Chapter 11 of Title 18, United States Code, relating to bribery, graft, and conflicts of interest, as appropriate to the employees concerned.

(c) The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(d) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(e) The prohibition against the employment of a member of a Communist organization (50 U.S.C. 784).

(f) The prohibitions against (1) the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and (2) the disclosure of confidential information (18 U.S.C. 1905).

(g) The provisions relating to the habitual use of intoxicants to excess (5 U.S.C. 7352).

(h) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a (c)).

(i) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(j) The prohibition against the use of deceit in an examination of personnel action in connection with Government employment (18 U.S.C. 1917).

(k) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(l) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(m) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(n) The prohibitions against (1) embezzlement of Government money or property (18 U.S.C. 641); (2) failing to account for public money (18 U.S.C. 643); and (3) embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(o) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(p) The prohibitions against political activities in subchapter III of Chapter 73 of Title 5, United States Code and 18 U.S.C. 602, 603, 607, and 608.

(q) The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

(r) Penalties: The following table, copied from the Federal Personnel Manual, lists maximum penalties for some of the more serious offenses.

Prohibition	Statute and United States Code	Maximum penalty
A-1. Gifts to official superiors	5 U.S.C. 7351	Removal.
A-2. Conflicts of interest:		
a. Receiving compensation in relation to claims contracts, etc.	18 U.S.C. 203	$10,000 fine; 2 years imprisonment or both; and removal.
b. Prosecuting claims against and other matters affecting the Government.	18 U.S.C. 205	$10,000 fine; 2 years imprisonment or both.
c. Prosecuting claims involving matters connected with former duties—disqualification of partners.	18 U.S.C. 207	$10,000 fine; 2 years imprisonment or both.
d. Interested persons acting as Government agents.	18 U.S.C. 208	$10,000 fine; 2 years imprisonment or both.
e. Salaries from other than Government sources.	18 U.S.C. 209	$5,000 fine; 1 year imprisonment or both.
A-3. Lobbying with appropriated funds	18 U.S.C. 1913	$500 fine; 1 year imprisonment or both; and removal.
A-4. Denial of rights to petition Congress	5 U.S.C. 7102	No specific penalty provided.
A-5. Failure to make return or report	18 U.S.C. 2075	$1,000 fine.
A-6. Disloyalty and striking	5 U.S.C. 7311; 18 U.S.C. 1918	$1,000 fine, 1 year and a day imprisonment or both; and removal.
A-7. Employment of member of proscribed communist organization.	50 U.S.C. 784 et seq	$10,000 fine; 5 years imprisonment or both; and removal.
A-8. Disclosure of classified information	18 U.S.C. 798; 50 U.S.C. 783	$10,000 fine; 10 years imprisonment or both; and removal.

Prohibition	Statute and United States Code	Maximum penalty
A-9. Disclosure of confidential information	18 U.S.C. 1905	$1,000 fine; 1 year imprisonment or both; and removal.
A-10. Habitual use of intoxicants to excess	5 U.S.C. 7352	Removal.
A-11. Misuse of Government vehicles	31 U.S.C. 638a(c)	Removal.
A-12. Misuse of franking privilege	18 U.S.C. 1719	$300 fine.
A-13. Deceit in examinations and personnel actions.	5 U.S.C. 1917	$1,000 fine; 1 year imprisonment or both.
A-14. Fraud and false statements	18 U.S.C. 1001	$10,000 fine; 5 years imprisonment or both.
A-15. Unlawful mutilating or destroying public records.	18 U.S.C. 2071(b)	$2,000 fine; 3 years imprisonment or both; and removal.
A-16. Bribery and graft:		
a. Bribery of public officials	18 U.S.C. 201	$20,000 fine or three times the money or thing received, whichever is greater; 15 years imprisonment of both; and removal.
b. Acceptance or solicitation to obtain appointive office.	18 U.S.C. 211	$1,000 fine; 1 year imprisonment or both.
A-17. Counterfeiting and forgery of transportation requests.	18 U.S.C. 508	$5,000 fine; 10 years imprisonment or both.
A-18. Embezzlement and theft:		
a. Taking money, property, or records	18 U.S.C. 641	$10,000 fine; 10 years imprisonment or both.
b. Failure to render accounts for public money.	18 U.S.C. 643	Fine equal to amount embezzled; imprisonment not more than 10 years or both.
c. Wrongfully converting property of another.	18 U.S.C. 654	Same as penalty immediately above.
A-19. Taking or using papers related to claims.	18 U.S.C. 285	$5,000 fine; 5 years imprisonment or both.

Subpart C—Special Government Employees: Ethical and Other Conduct and Responsibilities

§ 1400.735-30 Applicability of Subpart B of this part.

In addition to the rules of conduct issued herewith, special Government employees shall also be governed by the ethical and other conduct and responsibilities outlined in the following listed sections of this part:

Section 1400.735-11 Gifts, entertainment, and favors.
Section 1400.735-14 Use of Government property.
Section 1400.735-15 Misuse of information.
Section 1400.735-17 Gambling, betting, and lotteries.
Section 1400.735-18 General conduct prejudicial to the Government.
Section 1400.735-19 Influencing Members of Congress.
Section 1400.735-20 Code of Professional Conduct for Labor Mediators.

§ 1400.735-31 Representation of persons outside Government.

(a) A special Government employee may not, except in the discharge of his official duties, represent anyone else before a court or Government agency in a matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest, and in which he had at any time participated personally and substantially in the course of his Government employment.

(b) He may not, except in the discharge of his official duties, represent anyone else in a matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and which is pending before the Federal Mediation and Conciliation Service. However, this restraint is not applicable if he has served the Federal Mediation and Conciliation Service no more than 60 days during the past 365. He is bound by the restraint, if applicable, regardless of whether the matter is one in which he has ever participated personally and substantially.

(c) These restrictions prohibit both paid and unpaid respresentation and apply to a special Government employee on the days when he does not serve the Government, as well as on the days when he does.

§ 1400.735-32 Use of Government employment.

A special Government employee shall not use his Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself or another person, particularly one with whom he has family, business or financial ties.

§ 1400.735-33 Use of inside information.

A special Government employee shall not use inside information obtained as a result of his Government employment for private gain for himself or another person, either by direct action on his part, or by counsel, recommendation, or suggestion to another person, particularly one with whom he has family, business, or financial ties. For the purpose of this part, "inside information" means information obtained under Government authority which has not become a part of the body of public information. However, a special Government employee may teach, lecture, or write in a manner not inconsistent with § 1400.735-12(c) in regard to employees.

§ 1400.735-34 Coercion.

A special Government employee shall not use his Government employment to coerce, or give the appearance of coercing, a person to provide financial benefit to himself or another person, particularly one with whom he has family, business, or financial ties.

§ 1400.735-35 Miscellaneous statutory provisions.

Special Government employees shall acquaint themselves with each Statute that relates to their ethical and other conduct as a special Government employee. Upon entrance on duty, each special Government employee will be issued a copy of the regulations in this part, and shall be counseled to acquaint themselves with the statutes outlined in § 1400.735-21.

Subpart D—Statements of Employment and Financial Interests

§ 1400.735-40 Employees.

(a) *Covered employees.* (1) The following employees in the Federal Mediation and Conciliation Service must file employment and financial statements:

(i) The Deputy Director;

(ii) Employees in Grade GS-16 or above of the General Schedule; see § 1400.735-2.

(2) Although Federal Mediation and Conciliation Service mediators are not required to submit a statement of employment and financial interests, inherent in the position is the responsibility of the individual to report to his supervisor (Regional Director or Disputes Director) any situation where possible or apparent areas of conflict could appear. Examples of possible or apparent conflicts follow:

(i) Case assignment where the assigned mediator has interest (securities, etc.) in the company(ies) involved.

(ii) The assigned mediator has a close family relationship to officials or the staff of either party to the dispute.

(iii) In the judgment of the mediator, assignment to a specific case would in any way possibly result in embarrassment to the Service or the U.S. Government.

In these situations, the mediator should explain the circumstances to the Regional Director and suggest that he be relieved of such assignment.

(b) *Form and content of statements.* (1) FMCS Form AP-41 "confidential Statement of Employment and Financial Interests (For Use by Government employees)."

(2) Employees required to submit statements shall use FMCS Form AP-41 which will be issued to each employee for completion and signature at the time they meet the criteria specified in paragraph (a)(1) of this section.

(3) The statements shall be submitted to the counselor in confidence within 1 month of the employee's entrance into a covered category; or within 1 month of the effective date of this part, whichever is earlier. The Deputy Director and the counselor shall file the required statements with the Director.

(c) *Supplementary statements.* Changes in, or additions to, the information contained in an employee's statement of employment and financial interests shall be reported in a supplementary statement as of June 30 each year. If no changes or additions occur, a negative report is required. Notwithstanding the filing of the annual report required by this section, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflicts of interest provisions of section 203 of Title 18, United States Code, or Subpart B of this part.

(d) *Interests of employees' relatives.* The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee. For the purpose of this part, "member of an employee's immediate household" means those blood relations who are residents of the employee's household.

(e) *Information not known by employees.* If any information required to be included on a statement of employment and financial interests or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information in his behalf.

(f) *Information prohibited.* Employees are not required to submit on a statement of employment and financial interests or supplementary statement any information relating to the employee's connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise. For these purposes, educational and other institutions doing research and development or related work involving grants of money from, or contracts with the Government are deemed "business enterprises" and are required to be included in an employee's statement of employment and financial interests.

(g) *Effect of employees' statements on other requirements.* The statements of employment and financial interests and supplementary statements required of employees are in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, order, or regulation. The submission of a statement or supplementary statement by an employee does not permit him or any other person to participate in a matter in which his or the other person's participation is prohibited by law, order or regulation.

§ 1400.735-41 Special Government employees.

(a) Each special Government employee appointed by the Federal Mediation and Conciliation Service to a position equal in pay to or in excess of Grade GS-16 of the General Pay Scale, shall file a statement of employment and financial interests on a form to be furnished by the Service: *Provided, however,* That special or ad hoc mediators, working only to mediate labor disputes or appointed to emergency panels, or boards to mediate or find facts in specific disputes, are not required to file a statement of employment and financial interests due to the fact that the duties of the positions held by these appointees are of such a nature and at such a level of responsibility that the submission of such a statement is not necessary to protect the integrity of the Government. However, these special or ad hoc mediators must report to the Director any situation where possible or apparent areas of conflict could appear. See Subpart D, § 1400.735-40 for examples of such situations.

(b) It shall be the duty of the Federal Mediation and Conciliation Service to notify each of its special Government employees of the specific requirements of the regulations in this part and Executive Order 11222 concerning impartiality, integrity, and conflicts of interest.

(c) The statement of employment and financial interests shall be submitted not later than 1 month after the time of employment of the special Government employee. Each special Government employee shall keep his statement current throughout his employment with the Service by the submission of supplementary statement.

§ 1400.735-42 Confidentiality of statements.

Employees' and special Government employees' statements submitted in accordance with this part will be held

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in confidence by the Director and the Agency Counselor, and information may not be disclosed except as the Civil Service Commission or the Director may determine for good cause shown. The Director and Agency Counselor shall maintain the statements in confidence and shall not allow access to, or allow information to be disclosed from a statement except to carry out the purpose of this part.

Subpart E—Review of Statements, Disciplinary Action: Responsibilities and Procedures

§ 1400.735-50 Agency counselor.

The counselor will review each statement and supplementary statement of employment and financial interests within 1 week of receipt.

(a) *No conflict or appearance of conflict exists.* If no conflict or appearance of conflict is apparent, the statements shall be filed as confidential material in a secure fashion until two years after leaving the position requiring the statement. The statements will then be shredded and destroyed as stipulated for the destruction of classified information.

(b) *Conflict or appearance of conflict is evident.* If the counselor believes that a conflict or possible conflict exists from review of the statement, he will:

(1) Contact the employee or special Government employee and request a written explanation of the conflict or appearance of conflict.

(2) Submit his findings and this explanation to the Director.

§ 1400.735-51 Director.

(a) If, after considering the findings and the explanation, the Director decides that remedial action is required, he shall take immediate action to end the conflicts or appearance of conflicts of interest. Remedial action may include, but is not limited to:

(1) Changes in assigned duties;

(2) Divestment by the employee or special Government employee of his conflicting interest;

(3) Disciplinary action; or

(4) Disqualification for a particular assignment.

(b) All remedial action, whether disciplinary or otherwise, will be effected in accordance with Federal Mediation and Conciliation Service and Civil Service procedures.

§ 1400.735-52 Supervisor reporting.

Each supervisor shall be responsible for immediately reporting to the counselor the commission of any prohibited activity, as well as any conduct prejudicial to the best interests of the Service, or of a nature to bring discredit on it. The supervisor will promptly make a preliminary investigation of the matter and file a written report with the counselor. The counselor shall be responsible for:

(a) Receiving and following up complaints and information from all sources, including Federal agencies;

(b) Investigating by someone outside the organization unit involved;

(c) Referring immediately to the Department of Justice any information, allegation, or complaint indicating criminal activity;

(d) Taking such immediate interim action, through the Office of the Director of Administrative Management, as may be required to protect the best interests of the Service, including suspension.

§ 1400.735-53 Reports to the Director.

The counselor shall keep the Director advised as to any and all charges, suspensions, and reports concerning prohibited activity, prejudicial, or discreditable conduct on the part of any employee. The counselor shall submit a written report to the Director setting forth the method of investigation and the facts ascertained, together with his decision.

Subpart F—Disciplinary Actions and Penalties

§ 1400.735-60 Disciplinary actions.

The Service shall take prompt disciplinary action against an employee committing prohibited activity, or whose conduct is prejudicial to the best interests of the Service, or of a nature to bring discredit to it. There are four major types of disciplinary action possible, following the above proceedings.

(a) *Reprimand.* An official reprimand usually shall be issued to an employee or special Government employee for a first offense which is not serious.

(b) *Suspension.* Under Civil Service and Federal Mediation and Conciliation Service regulations, an employee or special Government employee may be suspended without pay during the course of an investigation of alleged criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct. Also, an employee may be suspended without pay for a definite period of time because of some offense of a less serious nature for which more drastic action is not justified.

(c) *Demotion.* When such action will "promote the efficiency of the Service," an employee or special Government employee may be demoted because of some offense for which more drastic action is not justified.

(d) *Separation.* The Service is responsible for the prompt dismissal of unsatisfactory, incompetent, or unfit employees. Separation (dismissal or removal) can be the penalty for a single breach of conduct that is extremely serious in nature.

§ 1400.735-61 Notice to and appeal of employee.

The Director of Administrative Management will prepare charges and institute proceedings, which in all cases will be in accordance with Civil Service procedures for disciplinary actions against status employees. Such proceedings will include notification to the employee of his appeal rights.

APPENDIX—CODE OF PROFESSIONAL CONDUCT FOR LABOR MEDIATORS

PREAMBLE

The practice of mediation is a profession with ethical responsibilities and duties. Those who engage in the practice of mediation must be dedicated to the principles of free and responsible collective bargaining. They must be aware that their duties and obligations relate to the parties who engage in collective bargaining, to every other mediator, to the agencies which administer the practice of mediation, and to the general public.

Recognition is given to the varying statutory duties and responsibilities of the city, State and Federal agencies. This code, however, is not intended in any way to define or adjust any of these duties and responsibilities, nor is it intended to define when and in what situations mediators from more than one agency should participate. It is, rather, a personal code relating to the conduct of the individual mediator.

This code is intended to establish principles applicable to all professional mediators employed by city, State or Federal agencies or to mediators privately retained by parties.

I. *The Responsibility of the Mediator to the Parties.* The primary responsibility for the resolution of a labor dispute rests upon the parties themselves. The mediator at all times should recognize that the agreements reached in collective bargaining are voluntarily made by the parties. It is the mediator's responsibility to assist the parties in reaching a settlement.

It is desirable that agreement be reached by collective bargaining without mediation assistance. However, public policy and applicable statutes recognize that mediation is the appropriate form of governmental participation in cases where it is required. Whether and when a mediator should intercede will normally be influenced by the desires of the parties. Intercession by a mediator on his own motion should be limited to exceptional cases.

The mediator must not consider himself limited to keeping peace at the bargaining table. His role should be one of being a resource upon which the parties may draw and, when appropriate, he should be prepared to provide both procedural and substantive suggestions and alternatives which will assist the parties in successful negotiations.

Since mediation is essentially a voluntary process, the acceptability of the mediator by the parties as a person of integrity, objectivity, and fairness is absolutely essential to the effective performance of the duties of the mediator. The manner in which the mediator carries out his professional duties and responsibilities will measure his usefulness as a mediator. The quality of his character as well as his intellectual, emotional, social and technical attributes will reveal themselves by the conduct of the mediator and his oral and written communications with the parties, other mediators and the public.

II. *The Responsibility of the Mediator Toward Other Mediators.* A mediator should not enter any dispute which is being mediated by another mediator or mediators without first conferring with the person or persons conducting such mediation. The mediator should not intercede in a dispute merely because another mediator may also be participating. Conversely, it should not be assumed that the lack of mediation participation by one mediator indicates a need for participation by another mediator.

In those situations where more than one mediator is participating in a particular case, each mediator has a responsibility to keep the others informed of developments which are essential to a cooperative effort, and should extend every possible courtesy to his fellow mediator.

The mediator should carefully avoid any appearance of disagreement with or criticism of his fellow mediator. Discussions as to what positions and actions mediators should take in particular cases should be carried on solely between or among the mediators.

III. *The Responsibility of the Mediator Toward His Agency and His Profession.* Agencies responsible for providing mediation assistance to parties engaged in collective bargaining are a part of government. The mediator must recognize that, as such, he is part of government. The mediator should constantly bear in mind that he and his work are not judged solely on an individual basis but that he is also judged as a representative of his agency. Any improper conduct or professional shortcoming, therefore, reflects not only on the individual mediator but upon his employer and, as such, jeopardizes the effectiveness of his agency, other government agencies, and the acceptability of the mediation process.

The mediator should not use his position for private gain or advantage, nor should he engage in any employment, activity or enterprise which will conflict with his work as a mediator, nor should he accept any money or thing of value for the performance of his duties—other than his regular salary—or incur obligations to any party which might interfere with the impartial performance of his duties.

IV. *The Responsibility of the Mediator Toward the Public.* Collective bargaining is in essence a private, voluntary process. The primary purpose of mediation is to assist the parties to achieve a settlement. Such assistance does not abrogate the rights of the parties to resort to economic and legal sanctions. However, the mediation process may include a responsibility to assert the interest of the public that a particular dispute be settled; that a work stoppage be ended; and that normal operations be resumed. It should be understood, however, that the mediator does not regulate or control any of the content of a collective bargaining agreement.

It is conceivable that a mediator might find it necessary to withdraw from a negotiation, if it is patently clear that the parties intend to use his presence as implied governmental sanction for an agreement obviously contrary to public policy.

It is recognized that labor disputes are settled at the bargaining table; however, the mediator may release appropriate information with due regard (1) to the desires of the parties, (2) to whether that information will assist or impede the settlement of the dispute and (3) to the needs of an informed public.

Publicity shall not be used by a mediator to enhance his own position or that of his agency. Where two or more mediators are mediating a dispute, public information should be handled through a mutually agreeable procedure.

V. *Responsibility of the Mediator Toward the Mediation Process.* Collective bargaining is an established institution in our economic way of life. The practice of mediation required the development of alternatives which the parties will voluntarily accept as a basis for settling their problems. Improper pressures which jeopardize voluntary action by the parties should not be a part of mediation.

Since the status, experience, and ability of the mediator lend weight to his suggestions and recommendations, he should evaluate carefully the effect of his suggestions and recommendations and accept full responsibility for their honesty and merit.

The mediator has a continuing responsibility to study industrial relations to improve his skills and upgrade his abilities.

Suggestions by individual mediators or agencies to parties, which give the implication that transfer of a case from one mediation "forum" to another will produce better results, are unprofessional and are to be condemned.

Confidential information acquired by the mediator should not be disclosed to others for any purpose, or in a legal proceeding or be used directly or indirectly for the personal benefit or profit of the mediator.

Bargaining positions, proposals or suggestions given to the mediator in confidence during the course of bargaining for his sole information, should not be disclosed to another party without first securing permission from the party or person who gave it to him.

[31 FR 5423, Apr. 6, 1966]

PART 1401—PUBLIC INFORMATION

Subpart A—Information in Response to Subpoenas

Sec.
1401.1 Purpose and scope.
1401.2 Productions of records or testimony by FMCS employees.

Sec.
1401.3 Procedure in the event of a demand for production, disclosure, or testimony.

Subpart B—Production or Disclosure of Information

1401.20 Purpose and scope.
1401.21 Information policy.
1401.22 Partial disclosure of records.
1401.23 Preparation of new records.
1401.24 Notices of dispute are disclosable.
1401.30 Applicability of procedures.
1401.31 Filing a request for records.
1401.32 Description of information requested.
1401.33 Logging of written requests.
1401.34 Time for processing requests.
1401.35 Appeals from denials of request.
1401.36 Fees—duplication cost and search.
1401.37 Annual report.

AUTHORITY: Sec. 202, 61 Stat. 153, as amended; 29 U.S.C. 172; Pub. L. 90-23, 81 Stat. 54-56 as amended by Pub. L. 93-502, 88 Stat. 1561-1565 (5 U.S.C. 552).

SOURCE: 40 FR 8169, Feb. 26, 1975, unless otherwise noted.

Subpart A—Information in Response to Subpoenas

§ 1401.1 Purpose and scope.

This subpart contains the regulations of the Service concerning procedures to be followed when a subpoena, order, or other demand of a court or other authority is issued for the production or disclosure of (a) any material contained in the files of the Service; (b) any information relating to material contained in the files of the Service; or (c) any information or material acquired by any person as a part of the performance of his official duties or because of his official status, while such person was an employee of the Service.

§ 1401.2 Production of records or testimony by FMCS employees.

(a) Public policy and the successful effectuation of the Federal Mediation and Conciliation Service's mission require that commissioners and employees maintain a reputation for impartiality and integrity. Labor and management or other interested parties participating in mediation efforts must have the assurance and confidence that information disclosed to commissioners and other employees of the Service will not subsequently be divulged, voluntarily or because of compulsion, unless authorized by the Director of the Service.

(b) No officer, employee, or other person officially connected in any capacity with the Service, currently or formerly shall, in response to a subpoena, subpoena duces tecum, or other judicial or administrative order, produce any material contained in the files of the Service, disclose any information acquired as part of the performance of his official duties or because of his official status, or testify on behalf of any party to any matter pending in any judicial, arbitral or administrative proceeding, without the prior approval of the Director.

§ 1401.3 Procedure in the event of a demand for production, disclosure or testimony.

(a) Any request for records of the Service, whether it be by letter, by subpoena duces tecum or by any other written demand, shall be handled pursuant to the procedures established in Subpart B of this part, and shall comply with the rules governing public disclosure.

(b) Whenever any subpoena or subpoena duces tecum calling for production of records or testimony as described above shall have been served upon any officer, employee or other person as noted in § 1401.2(b), he will, unless notified otherwise appear in answer thereto, and unless otherwise expressly directed by the Director, respectfully decline to produce or present such records or to give such testimony, by reason of the prohibitions of this section, and shall state that the production of the record(s) involved will be handled by the procedures established in this part.

Subpart B—Production or Disclosure of Information

§ 1401.20 Purpose and scope.

This subpart contains the regulations of the Federal Mediation and Conciliation Service providing for public access to information from records of the Service. These regulations implement the Freedom of Information Act, 5 U.S.C. 552, as amended by Pub. L. 93-502, and the policy of the FMCS to disseminate information on matters of interest to the public and to disclose to members of the public on request such information contained in records in its custody insofar as is compatible with the discharge of its responsibilities and the principle of confidentiality of dispute resolution by third party neutrals, consistent with applicable law.

§ 1401.21 Information policy.

(a) Except for matters specifically excluded by subsection 552(b) of Title 5, United States Code, or other applicable statute, all documents and records maintained by this agency or within the custody thereof shall be available to the public upon request filed in accordance with these regulations. To the extent permitted by other laws, the Service also will make available records which it is authorized to withhold under 5 U.S.C. 552(b) whenever it determines that such disclosure is in the public interest.

(b) Any document released for inspection under the provisions of this part may be manually copied by the requesting party. The Service shall provide facilities for copying such documents at reasonable times during normal working hours so long as it does not interfere with the efficient operation of the agency.

(c) The Service will also publish and maintain a current index, revised quarterly, providing identifying information for the public as to statements of policy and interpretation adopted by the agency and still in force but not published in the FEDERAL REGISTER, and administrative staff manuals and instructions to staff that affect a member of the public. The Service will also maintain on file all material published by the Service in the FEDERAL REGISTER and currently in effect.

(d) Records or documents prepared by the Service for routine public distribution, e.g., pamphlets, speeches, and educational or training materials, shall be furnished free of charge upon request to the Office of Information, Federal Mediation and Conciliation Service, 14th Street and Constitution Avenue, NW., Washington, D.C. 20427, as long as the supply lasts. The provisions of § 1401.36 shall not be applicable to such requests except when the supply of such material is exhausted and it is necessary to reproduce individual copies upon specific request.

(e) All existing FMCS records are subject to routine destruction according to standard record retention schedules.

§ 1401.22 Partial disclosure of records.

If a record contains both disclosable and nondisclosable information, the nondisclosable information will be deleted and the remaining record will be disclosed unless the two are so inextricably intertwined that it is not feasible to separate them or release of the disclosable information would compromise or impinge upon the nondisclosable portion of the record.

§ 1401.23 Preparation of new records.

(a) The Freedom of Information Act and the provisions of this part apply only to existing records that are reasonably described in a request filed with the Federal Mediation and Conciliation Service pursuant to the procedures established in §§ 1401.31-1401.34.

(b) The Director may, in his discretion, prepare new records in order to respond to a request for information when he concludes that it is in the public interest and promotes the objectives of the Labor-Management Relations Act, 1947, as amended.

§ 1401.24 Notices of dispute are disclosable.

Written notices of disputes received by the Service pursuant to sections 8(d)(3), 8(d)(A) and 8(d)(B) of the Labor-Management Relations Act, 1947, as amended, are not exempt from disclosure. Parties at interest have the right to receive certified copies of any such notice of dispute upon written request. Requests for copies of notices should be submitted to FMCS, Division of Case Control, 2100 K Street, NW., Washington, D.C. 20427.

[40 FR 8169, Feb. 26, 1975, as amended at 47 FR 10531, Mar. 11, 1982]

§ 1401.30 Applicability of procedures.

Requests for inspection or copying of information from records in the custody of the FMCS which are reasonably identifiable and available under the provisions of this part shall be made and acted upon as provided in the following sections of this subpart. The prescribed procedure shall be followed in all cases where access is sought to official records pursuant to the provisions of the Freedom of Information Act, except with respect to records for which a less formal disclosure procedure is provided specifically in this part.

§ 1401.31 Filing a request for records.

(a) Any person who desires to inspect or copy any record covered by this part shall submit a written request to that effect to the appropriate office of FMCS which has custody of the record. Standard forms for making a request are not required.

(1) If the records are kept in Washington, D.C., the request shall be directed to the Director of the office, as specified in paragraph (b).

(2) If the records are kept in a field office, the request shall be directed to the office of the regional Director of the region within which the field office maintains custody of such records, as specified in paragraph (c).

(3) If the person making the request does not know where the record is located, he may direct his request to the Director of Administration, FMCS, listed in paragraph (b), below.

(b) The Washington, D.C. offices of FMCS referred to in paragraph (a)(1) of this section, located at 2100 K Street, NW., Washington, D.C. 20427, are as follows:

(1) Office of the National Director (202) 961-3501.

(2) Office of the General Counsel (202) 961-3714.

(3) Office of Mediation Services (202) 961-3505.

(4) Office of Arbitration Services (202) 961-3513.

(5) Office of Administration (202) 961-3566.

(6) Office of Technical Services (202) 961-3553.

(7) Office of Information (202) 961-3518.

(c) The regional Director's office referred to in paragraph (a)(2) of this section are:

Region 1—Room 2937, Federal Building, 26 Federal Plaza, New York, N.Y. 10007; (212) 264-1000.

Region 2—Room 401, Mall Building, Fourth and Chestnut Streets, Philadelphia, Pa. 19106; (215) 597-7680.

Region 3—Suite 400, 1422 West Peachtree Street, N.W., Atlanta, Ga. 30309; (404) 526-2473.

Region 4—Room 1525, Superior Building, 815 Superior Avenue, N.E., Cleveland, Ohio 44114; (216) 522-4800.

Region 5—Room 1402, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, Ill. 60604; (312) 353-7350.

Region 6—Room 3266, Federal Building, 1520 Market Street, St. Louis, Mo. 63103; (314) 622-4591.

Region 7—Room 13471, New Federal Office Building, 450 Golden Gate Avenue, P.O. Box 36007, San Francisco, Calif. 94102; (415) 556-4670.

[40 FR 8169, Feb. 26, 1975, as amended at 47 FR 10530, Mar. 11, 1982]

§ 1401.32 Description of information requested.

(a) Each request should reasonably describe the records being sought, in a way that they can be identified and located. A request should include all pertinent details that will help identify the records sought.

(b) If the description is insufficient, the officer processing the request will so notify the person making the request and indicate the additional information needed. Every reasonable effort shall be made to assist in the identification and location of the records sought.

§ 1401.33 Logging of written requests.

(a) All requests for records should be clearly and prominently identified as a request for information under the Freedom of Information Act, and if submitted by mail or otherwise submitted in an envelope or other cover, should be clearly and prominently identified as such on the envelope or other cover.

(b) Upon receipt of a request for records, the officer processing the request shall enter it in a public log. The log shall state the date and time received, the name and address of the person making the request, the nature of the records requested, the action taken on the request, the date of the determination letter sent pursuant to § 1401.34 (b) and (d), the date(s) any records are subsequently furnished, the number of staff hours and grade levels of persons who spent time responding to the request, and the payment requested and received.

§ 1401.34 Time for processing requests.

(a) All time limitations established pursuant to this section shall begin as of the time at which a request for records is logged in by the officer processing the request pursuant to § 1401.33(b). An oral request for records shall not begin any time requirement. A written request for records sent to an office of FMCS other than the one having authority to grant or deny access to the records shall be redirected immediately to the appropriate officer for processing, and the time shall begin upon its being logged in there in accordance with § 1401.33(b).

(b) The officer passing upon the request for records shall, within ten (10) working days following receipt of the request, respond in writing to the requester, determining whether, or the extent to which, the agency shall comply with the request.

(1) If all of the records requested have been located and a final determination has been made with respect to disclosure of all of the records requested, the response shall so state.

(2) If all of the records have not been located or a final determination has not been made with respect to disclosure of all the records requested, the response shall state the extent to which the records involved shall be disclosed pursuant to the rules established in this part.

(3) If the request is expected to involve an assessed fee in excess of $50.00, the response shall specify or estimate the fee involved and shall require prepayment before the records are made available.

(4) Whenever possible, the response relating to a request for records that involves a fee of less than $50.00, shall be accompanied by the requested records. Where this is not possible, the records shall be forwarded as soon as possible thereafter, consistent with other obligations of the agency.

(c) In the following circumstances, the time for passing upon the request may be extended for up to an additional 10 working days by written notice to the person making the request, setting forth the reasons for such extension and the time within which a determination is expected to be made:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(d) If any request for records is denied in whole or in part, the response required by paragraph (b) of this section shall notify the requester of the denial. Such denial shall specify the reason therefor and also advise that the denial may be appealed to the Office of Deputy National Director of the agency as specified in § 1401.35.

§ 1401.35 Appeals from denials of request.

(a) Whenever any request for records is denied, a written appeal may be filed with the Deputy National Director, FMCS, Washington, D.C. 20427, within 30 days after requester receives notification that the request has been denied or after the requester receives any records being made available, in the event of partial denial. The appeal shall state the grounds for appeal, including any supporting statements or arguments.

(b) Final action on the appeal shall be taken within 20 working days from the time of receipt of the appeal. Where novel and complicated questions have been raised or unusual difficulties have been encountered, the Deputy National Director may extend the time for final action up to an additional 10 days, depending upon whether there had been an extension pursuant to § 1401.34(c) at the initial stage. In such cases, the applicant shall be notified in writing of the reasons for the extension of time and the approximate date on which a final response will be forthcoming.

(c) If on appeal the denial of the request for records is upheld in whole or in part, the Deputy National Director shall notify the applicant of the reasons therefor, and shall advise the requester of the provisions for judicial review under 5 U.S.C. 552(a) (4) and (6).

§ 1401.36 Fees—duplication cost and search.

(a) Unless waived in accordance with paragraph (d) of this section, the following schedule of fees shall be imposed for the production and copying of any record pursuant to this part.

(1) *Copy of records.* Twenty ($0.20) cents per copy per page.

(2) *Clerical searches.* $1.25 for each one-quarter hour of fraction thereof spent in excess of the first quarter-hour in searching for or producing a requested record, including time spent copying any record.

(3) *Nonclerical searches.* $3.50 for each one-quarter hour spent by professional or managerial personnel searching for or producing a requested record, including time spent copying any record.

(4) *Certification or authentication of records.* $2.00 per certification or authentication.

(5) *Forwarding material to destination.* Postage, insurance, and special fees will be charged on an actual cost basis.

(b) Rules of construction: In providing the foregoing fee schedule pursuant to the provisions of 5 U.S.C. 552(a)(3), it is the intent of this section to apply 29 U.S.C. 9(b) and the user charge statute (31 U.S.C. 483(a)) to cover those situations where the agency is performing for a requester services which are not required under the Freedom of Information Act.

(c) No fee shall be charged if a record requested is not found or for any record that is totally exempt from disclosure.

(d) The officer processing the request for records may, in his discretion, waive or reduce fees otherwise applicable under paragraph (a) of this section for services in producing and copying record information under the following circumstances:

(1) Where inability to pay is demonstrated and it is clear that a significant public interest would be served by providing the service free of charge.

(2) Where it is in the public interest because furnishing the information can be considered primarily as benefiting the general public.

(3) In making a determination of the broad public interest involved, the officer shall weigh the agency resources involved against the likely benefit to the public.

(e) Payment of fees: Payment shall be made by check or money order payable to "Federal Mediation and Conciliation Service," and shall be sent to the Director of the Office of Administration, FMCS, 14th and Constitution Avenue NW., Washington, D.C. 20427.

§ 1401.37 Annual report.

(a) The Office of National Director shall annually, within 60 days following the close of each calendar year, prepare a report covering each of the categories of records to be maintained in accordance with 5 U.S.C. 552(d) for such calendar year and shall forthwith submit the same to the Speaker of the House of Representatives and the President of the Senate for referral to the appropriate committees of the Congress.

PART 1402—PROCEDURES OF THE SERVICE

§ 1402.1 Notice of dispute.

The notice of dispute filed with the Federal Mediation and Conciliation Service pursuant to the provisions of section 8(d)(3), of the Labor-Management Relations Act, 1947, as amended, shall be in writing. The following Form F-7, for use by the parties in filing a notice of dispute, has been prepared by the Service:

FMCS Form F-7.
Revised May 1964.

NOTICE TO MEDIATION AGENCIES

To: Federal Mediation and Conciliation Service, Washington, D.C. 20427; and
To: (Appropriate State or Territorial agency.)

Date ——————

You are hereby notified that written notice of the proposed termination or modification of the existing collective bargaining contract was served upon the other party to this contract and that no agreement has been reached.

1. (a) Name of employer (if more than one company or an association, submit names and addresses on separate sheet in duplicate). Phone No. ————

Address of establishment affected (Street) (City) (State) (Zip Code).

(If more than one establishment, or plant, list addresses on separate sheet.)

(b) Employer Official to communicate with (name and title).

Address: Phone No. ———.
—————— (Street), ——————
(City), —————— (State).

2. (a) International union ——————
Local No. ——. AFL1-CIO ( ). Independent ( ). Phone No. ——. Address of local union:

—————— (Street), ——————
(City), —————— (State), ——— (Zip Code).

(b) Union official to communicate with ——————. Phone No. ———.
Address:

—————— (Street), ——————
(City), —————— (State), ——— (Zip Code).

3. (a) Number of employees covered by the Contract(s) ——.

(b) Total number employed by the Company at this location(s) ——.

4. Type of establishment and principal products, or services ——————
(Factory, mine, wholesaler, over-the-road trucking, etc.).

5. Contract expiration or reopening date ————.

6. Name of official filing this notice ——————. Title ——————.
Address —————— Phone No. ——.

Check on whose behalf this notice is filed:
Union ————. Employer ————
Signature ——————————

Receipt of this notice does not constitute a request for mediation nor does it commit the agencies to offer their facilities. This particular form of notice is not legally required. Receipt of notice will not be acknowledged in writing by the Federal Mediation and Conciliation Service. (Attach copies of any statement you wish to make to the Mediation Agencies.)

Copies of this Form F-7 are obtainable at the national, regional and field offices of the Service. This form may be duplicated for use by representatives of employers or unions provided it is copied in full without change.

(Sec. 202, 61 Stat. 153, sec. 3, 80 Stat. 250, sec. 203, 61 Stat. 153; 5 U.S.C. 552, 29 U.S.C. 172, 173)

[32 FR 9812, July 6, 1967, as amended by 47 FR 10531, Mar. 11, 1982]

PART 1403—FUNCTIONS AND DUTIES

Sec.
1403.1 Definitions.
1403.2 Policies of the Federal Mediation and Conciliation Service.
1403.3 Obtaining data on labor-management disputes.
1403.4 Assignment of mediators.
1403.5 Relations with State and local mediation agencies.

AUTHORITY: Sec. 202, 61 Stat. 153, sec. 3, 80 Stat. 250, sec. 203, 61 Stat. 153; 29 U.S.C. 172, 5 U.S.C. 552, 29 U.S.C. 173.

SOURCE: 32 FR 9813, July 6, 1967, unless otherwise noted.

§ 1403.1 Definitions.

As used in this part, unless the context clearly indicates otherwise;

(a) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia, or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(b) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor-management dispute burdening or obstructing commerce or the free flow of commerce.

(c) The term "labor union" or "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(d) The term "State or other conciliation services" means the official and accredited mediation and conciliation establishments of State and local governments, which are wholly or partially supported by public funds.

(e) The term "proffer its services," as applied to the functions and duties of the Federal Mediation and Conciliation Service, means to make mediation services and facilities available either on its own motion or upon the request of one or more of the parties to a dispute.

§ 1403.2 Policies of the Federal Mediation and Conciliation Service.

It is the policy of the Federal Mediation and Conciliation Service:

(a) To facilitate and promote the settlement of labor-management disputes through collective bargaining by encouraging labor and management to resolve differences through their own resources.

(b) To encourage the States to provide facilities for fostering better labor-management relations and for resolving disputes.

(c) To proffer its services in labor-management disputes in any industry affecting commerce, except as to any matter which is subject to the provisions of the Railway Labor Act, as amended, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption to commerce.

(d) To refrain from proffering its services: (1) In labor-management disputes affecting intrastate commerce exclusively, (2) in labor-management disputes having a minor effect on interstate commerce, if State or other conciliation services are available to the parties, or (3) in a labor-management dispute when a substantial question of representation has been raised, or to continue to make its facilities available when a substantial question of representation is raised during the negotiations.

(e) To proffer its services in any labor-management dispute directly involving Government procurement contracts necessary to the national defense, or in disputes which imperil or threaten to imperil the national health or safety.

(f) To proffer its services to the parties in grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement only as a last resort and in exceptional cases.

§ 1403.3 Obtaining data on labor-management disputes.

When the existence of a labor-management dispute comes to the attention of the Federal Service upon a request for mediation service from one or more parties to the dispute, through notification under the provisions of section 8(d)(3), Title I of the Labor-Management Relations Act, 1947, or otherwise, the Federal Service will examine the information to determine if the Service should proffer its services under its policies. If sufficient data on which to base a determination is not at hand, the Federal Service will inquire into the circumstances surrounding the case. Such inquiry will be conducted for fact-finding purposes only and is not to be interpreted as the Federal Service proffering its services.

§ 1403.4 Assignment of mediators.

The Federal Service will assign one or more mediators to each labor-management dispute in which it has been determined that its services should proffered.

§ 1403.5 Relations with State and local mediation agencies.

(a) If under State or local law a State or local mediation agency must offer its facilities in a labor-management dispute in which the Federal Service is proffering its services, the interests of such agencies will be recognized and their co-operation will be encouraged in order that all efforts may be made to prevent or to effectively minimize industrial strife.

(b) If, in a labor-management dispute there is reasonable doubt that the dispute threatens to cause a substantial interruption to commerce or that there is more than a minor effect upon interstate commerce, and State or other conciliation services are available to the parties, the regional director of the Federal Service will endeavor to work out suitable arrangements with the State or other conciliation or mediation agency for mediation of the dispute. Decisions in such cases will take into consideration the desires of the parties, the effectiveness and availability of the respective facilities, and the public welfare, health, and safety.

(c) If requested by a State or local mediation agency or the chief executive of a State or local government, the Federal Service may make its services available in a labor-management dispute which would have only a minor effect upon interstate commerce when, in the judgment of the Federal Service, the effect of the dispute upon commerce or the public welfare, health, or safety justifies making available its mediation facilities.

PART 1404—ARBITRATION SERVICES

Subpart A—Arbitration Policy; Administration of Roster

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1404.16 Fees and charges of arbitrators.
1404.17 Reports and biographical sketches.

AUTHORITY: Sec. 202, 61 Stat. 153, as amended; 29 U.S.C. 172, and interpret or apply sec. 3, 80 Stat. 250, sec. 203, 61 Stat. 153; 5 U.S.C. 552, 29 U.S.C. 173.

SOURCE: 44 FR 13008, Mar. 9, 1979, unless otherwise noted.

Subpart A—Arbitration Policy; Administration of Roster

§ 1404.1 Scope and authority.

This chapter is issued by the Federal Mediation and Conciliation Service (FMCS) under Title II of the Labor Management Relations Act of 1947 (Pub. L. 80-101) as amended in 1959 (Pub. L. 86-257) and 1974 (Pub. L. 93-360). The chapter applies to all arbitrators listed on the FMCS Roster of Arbitrators, to all applicants for listing on the Roster, and to all persons or parties seeking to obtain from FMCS either names or panels of names of arbitrators listed on the Roster in connection with disputes which are to submitted to arbitration or fact-finding.

§ 1404.2 Policy.

The labor policy of the United States is designed to promote the settlement of issues between employers and represented employees through the processes of collective bargaining and voluntary arbitration. This policy encourages the use of voluntary arbitration to resolve disputes over the interpretation or application of collective bargaining agreements. Voluntary arbitration and fact-finding in disputes and disagreements over establishment or modification of contract terms are important features of constructive labor-management relations, as alternatives to economic strife in the settlement of labor disputes.

§ 1404.3 Administrative responsibilities.

(a) *Director.* The Director of FMCS has ultimate responsibility for all aspects of FMCS arbitration activities and is the final agency authority on all questions concerning the Roster or FMCS arbitration procedures.

(b) *Office of Arbitration Services.* The Office of Arbitration Services (OAS) maintains a Roster of Arbitrators (the "Roster"); administers Subpart C of these regulations (Procedures for Arbitration Services); assists, promotes, and cooperates in the establishment of programs for training and developing new arbitrators; collects information and statistics concerning the arbitration function, and performs other tasks in connection with the function that may be assigned by the Director.

(c) *Arbitrator Review Board.* The Arbitrator Review Board (the "Board") shall consist of a presiding officer and such members and alternate members as the Director may appoint, and who shall serve at the Director's pleasure and may be removed at any time. The Board shall be composed entirely of full-time officers or employees of the Federal Government. The Board shall establish its own procedures for carrying out its duties.

(1) *Duties of the Board.* The Board shall:

(i) Review the qualifications of all applicants for listing on the Roster, interpreting and applying the criteria set forth in § 1404.5;

(ii) Review the status of all persons whose continued eligibility for listing on the Roster has been questioned under § 1404.5;

(iii) Make recommendations to the Director regarding acceptance or rejection of applicants for listing on the Roster, or regarding withdrawal of listing on the Roster for any of the reasons set forth herein.

Subpart B—Roster of Arbitrators; Admission and Retention

§ 1404.4 Roster and status of members.

(a) *The Roster.* The FMCS shall maintain a Roster of labor arbitrators consisting of persons who meet the criteria for listing contained in § 1404.5 and whose names have not been removed from the Roster in accordance with § 1404.5(d).

(b) *Adherence to Standards and Requirements.* Persons listed on the Roster shall comply with the FMCS rules and regulations pertaining to arbitration and with such guidelines and procedures as may be issued by OAS pursuant to Subpart C of this part. Arbitrators are also expected to conform to the ethical standards and procedures set forth in the Code of Professional Responsibility for Arbitrators of Labor Management Disputes, as approved by the Joint Steering Committee of the National Academy of Arbitrators.

(c) *Status of arbitrators.* Persons who are listed on the Roster and are selected or appointed to hear abritration matters or to serve as factfinders do not become employees of the Federal Government by virtue of their selection or appointment. Following selection or appointment, the arbitrator's relationship is solely with the parties to the dispute, except that arbitrators are subject to certain reporting requirements and to standards of conduct as set forth in this part.

(d) *Role of FMCS.* FMCS has no power to:

(1) Compel parties to arbitrate or agree to arbitration;

(2) Enforce an agreement to arbitrate;

(3) Compel parties to agree to a particular arbitrator;

(4) Influence, alter or set aside decisions of arbitrators listed on the Roster;

(5) Compel, deny or modify payment of compensation to an arbitrator.

(e) *Nominations and Panels.* On request of the parties to an agreement to arbitrate or engage in fact-finding, or where arbitration or fact-finding may be provided for by statute, OAS will provide names or panels of names without charge. Procedures for obtaining these services are contained in Subpart C of this part. Neither the submission of a nomination or panel nor the appointment of an arbitrator constitutes a determination by FMCS that an agreement to arbitrate or enter fact-finding proceedings exists; nor does such action constitute a ruling that the matter in controversy is arbitrable under any agreement.

(f) *Rights of persons listed on the Roster.* No person shall have any right to be listed or to remain listed on the Roster. FMCS retains the authority and responsibility to assure that the needs of the parties using its facilities are served. To accomplish this purpose it may establish procedures for the preparation of panels or the appointment of arbitrators or fact finders which include consideration of such factors as background and experience, availability, acceptability, geographical location and the expressed preferences of the parties.

§ 1404.5 Listing on the Roster; Criteria for listing and retention.

Persons seeking to be listed on the Roster must complete and submit an application form which may be obtained from the Office of Arbitration Services. Upon receipt of an executed form, OAS will review the application, assure that it is complete, make such inquiries as are necessary, and submit the application to the Arbitrator Review Board. The Board will review the completed applications under the criteria set forth in paragraphs (a), (b) and (c) of this section, and will forward to the Director its recommendation on each applicant. The Director makes all final decisions as to whether an applicant may be listed. Each applicant shall be notified in writing of the Director's decision and the reasons therefore.

(a) *General Criteria.* Applicants for the Roster will be listed on the Roster upon a determination that they:

(1) Are experienced, competent and acceptable in decision-making roles in the resolution of labor relations disputes; or

(2) Have extensive experience in relevant positions in collective bargaining; and

(3) Are capable of conducting an orderly hearing, can analyze testimony and exhibits and can prepare clear and concise findings and awards within reasonable time limits.

(b) *Proof of Qualification.* The qualifications listed in paragraph (a) of this section are preferably demonstrated by the submission of actual arbitration awards prepared by the applicant while serving as an impartial arbitrator chosen by the parties to disputes. Equivalent experience acquired in training, internship or other development programs, or experience such as that acquired as a hearing officer or judge in labor relations controversies may also be considered by the Board.

(c) *Advocacy*—(1) *Definition.* An advocate is a person who represents employers, labor organizations, or individuals as an employee, attorney or consultant, in matters of labor relations, including but not limited to the subjects of union representation and recognition matters, collective bargaining, arbitration, unfair labor practices, equal employment opportunity and other areas generally recognized as constituting labor relations. The definition includes representatives of employers or employees in individual cases or controversies involving workmen's compensation, occupational health or safety, minimum wage or other labor standards matters. The definition of advocate also includes a person who is directly associated with an advocate in a business or professional relationship as, for example, partners or employees of a law firm.

(2) *Eligibility.* Except in the case of persons listed on the Roster before November 17, 1976, no person who is an advocate, as defined above, may be listed. No person who was listed on the Roster at any time who was not an advocate when listed or who did not divulge advocacy at the time of listing may continue to be listed after becoming an advocate or after the fact of advocacy is revealed.

(d) *Duration of listing, retention.* Initial listing may be for a period not to exceed three years, and may be renewed thereafter for periods not to exceed two years, provided upon review that the listing is not canceled by the Director as set forth below. Notice of cancellation may be given to the member whenever the member:

(1) No longer meets the criteria for admission;

(2) Has been repeatedly and flagrantly delinquent in submitting awards;

(3) Has refused to make reasonable and periodic reports to FMCS, as required in Subpart C of this part, concerning activities pertaining to arbitration;

(4) Has been the subject of complaints by parties who use FMCS facilities and the Director, after appro-

priate inquiry, concludes that just cause for cancellation has been shown.

(5) Is determined by the Director to be unacceptable to the parties who use FMCS arbitration facilities; the Director may base a determination of unacceptability on FMCS records showing the number of times the arbitrator's name has been proposed to the parties and the number of times it has been selected.

No listing may be canceled without at least sixty days notice of the reasons for the proposed removal, unless the Director determines that the FMCS or the parties will be harmed by continued listing. In such cases an arbitrator's listing may be suspended without notice or delay pending final determination in accordance with these procedures. The member shall in either case have an opportunity to submit a written response showing why the listing should not be cancelled. The Director may, at his discretion, appoint a hearing officer to conduct an inquiry into the facts of any proposed cancellation and to make recommendations to the Director.

§ 1404.6 Freedom of choice.

Nothing contained herein should be construed to limit the rights of parties who use FMCS arbitration facilities jointly to select any arbitrator or arbitration procedure acceptable to them.

Subpart C—Procedures for Arbitration Services

§ 1404.10 Procedures for requesting arbitration panels.

The Office of Arbitration Services has been delegated the responsibility for administering all requests for arbitration services under these regulations.

(a) The Service will refer a panel of arbitrators to the parties upon request. The Service prefers to act upon a joint request which should be addressed to the Federal Mediation and Conciliation Service, Washington, D.C. 20427, Attention: Office of Arbitration Services. In the event that the request is made by only one party, the Service will submit a panel; however, any submission of a panel should not be construed as anything more than compliance with a request and does not necessarily reflect the contractual requirements of the parties.

(b) The parties are urged to use the Request for Arbitration Panel form (R-43) which has been prepared by the Service and is available in quantity at all FMCS regional offices and field stations or upon request to the Office of Arbitration Services, 2100 K Street, Washington, D.C. 20427. The form R-43 is reproduced herein for purposes of identification.

FMCS Form R–43
Sep 1975

Form Approved
OMB NO. 23–R0007

FEDERAL MEDIATION AND CONCILIATION SERVICE

WASHINGTON, D.C. 20427

REQUEST FOR ARBITRATION PANEL

To: Director, Arbitration Services
Federal Mediation and Conciliation Service
Washington, D.C. 20427

Date ____________________

1. (For Company)

Name of Company ____________________

Name and Address of Representative to Receive Panel ____________________ (NAME)
____________________ (STREET)
____________________ (CITY STATE ZIP)

Telephone (include area code) ____________________

2. (For Union)

Name of Union and Local No. ____________________

Name and Address of Representative to Receive Panel ____________________ (NAME)
____________________ (STREET)
____________________ (CITY STATE ZIP)

Telephone (include area code) ____________________

3. Site of Dispute ____________________ (CITY, STATE, ZIP)

4. Type of Issue ____________________ (DISCHARGE, HOLIDAY PAY, SICK LEAVE, ETC.)

5. A panel of seven (7) names is usually provided; if you desire a different number, please indicate ____________________

6. Type of Industry

☐ Manufacturing
☐ Construction
☐ Mining, Agriculture and Finance
☐ Federal Government
☐ State Government
☐ Local Government
☐ Public Utilities, Communications, Transportation (including trucking)
☐ Retail, Wholesale and Service Industries
☐ Other (Specify) ____________________

7. Special Requirements ____________________ (SPECIAL ARBITRATOR QUALIFICATIONS, TIME LIMITATIONS ON HEARING OR DECISION, GEOGRAPHICAL RESTRICTIONS, ETC.)

8. Signatures ____________________ (COMPANY)
____________________ (UNION)

Although the FMCS prefers to act upon a joint request of the parties, a submission will be made based on the request of a single party. However, any submission of a panel should not be construed as anything more than compliance with a request and does not reflect on the substance or arbitrability of the issue in dispute.

Additional forms may be obtained from the Federal Mediation and Conciliation Service or any FMCS Regional Office. See list on reverse of Copy No. 3.

To be retained by party filing request

(c) A brief statement of the issues in dispute should accompany the request to enable the Service to submit the names of arbitrators qualified for the issues involved. The request should also include a current copy of the arbitration section of the collective bargaining agreement or stipulation to arbitrate.

(d) If form R-43 is not utilized, the parties may request a panel by letter which must include the names, addresses, and phone numbers of the parties, the location of the contemplated hearing, the issue in dispute, the number of names desired on the panel, the industry involved and any special qualifications of the panel or special requirement desired.

§ 1404.11 Arbitrability.

Where either party claims that a dispute is not subject to arbitration, the Service will not decide the merit of such claim.

§ 1404.12 Nominations of arbitrators.

(a) When the parties have been unable to agree on an arbitrator, the Service will submit to the parties on request the names of seven arbitrators unless the applicable collective bargaining agreement provides for a different number, or unless the parties themselves request a different number. Together with the submission of a panel of arbitrators, the Service will furnish a biographical sketch for each member of the panel. This sketch states the background, qualifications, experience, and per diem fee established by the arbitrator. It states the existence, if any, of other fees such as cancellation, postponement, rescheduling or administrative fees.

(b) When a panel is submitted, and FMCS control case number is assigned. All future communication between the parties and the Service should refer to the case number.

(c) The Service considers many factors when selecting names for inclusion on a panel, but the agreed-upon wishes of the parties are paramount. Special qualifications of arbitrators experienced in certain issues or industries, or possessing certain backgrounds, may be identified for purposes of submitting panels to accommodate the parties. The Service may also consider such things as general acceptability, geographical location, general experience, availability, size of fee, and the need to expose new arbitrators to the selection process in preparing panels. The Service has no obligation to put an individual on any given panel, or on a minimum number of panels in any fixed period, such as a month or a year.

(1) If at any time both parties request for valid reason, that a name or names be omitted from a panel, such name or names will be omitted, unless they are excessive in number.

(2) If at any time both parties request that a name or names be included on a panel, such name or names will be included.

(3) If only one party requests that a name or names be omitted from a panel, or that specific individuals be added to the panel, such request shall not be honored.

(4) If the issue described in the request appears to require special technical experience or qualifications, arbitrators who possess such qualifications will, where possible, be included on the panel submitted to the parties.

(5) In almost all cases, an arbitrator is chosen from one panel. However, if either party requests another panel, the Service shall comply with the request providing that an additional panel is permissible under the terms of the agreement or the other party so agrees. Requests for more than two panels must be accompanied by a statement of explanation and will be considered on a case-by-case basis.

§ 1404.13 Selection and appointment of arbitrators.

(a) The parties should notify the OAS of their selection of an arbitrator. The arbitrator, upon notification by the parties, shall notify the OAS of his selection and willingness to serve. Upon notification of the parties' selection of an arbitrator, the Service will make a formal appointment of the arbitrator.

(b) Where the contract is silent on the manner of selecting arbitrators, the parties may wish to consider one of the following methods for selection of an arbitrator from a panel:

(1) Each party alternately strikes a name from the submitted panel until one remains.

(2) Each party advises the Service of its order of preference by numbering each name on the panel and submitting the numbered list in writing to OAS. The name on the panel that has the lowest accumulated numerical number will be appointed.

(3) Informal agreement of the parties by whatever method they choose.

(c) The Service will, on joint or unilateral request of the parties, submit a panel or, when the applicable collective bargaining agreement authorizes, will make a direct appointment of an arbitrator. Submission of a panel or name signifies nothing more than compliance with a request and in no way constitutes a determination by the Service that the parties are obligated to arbitrate the dispute in question. Resolution of disputes as to the propriety of such a submission or appointment rests solely with the parties.

(d) The arbitrator, upon notification of appointment, is required to communicate with the parties immediately to arrange for preliminary matters, such as date and place of hearing.

§ 1404.14 Conduct of hearings.

All proceedings conducted by the arbitrator shall be in conformity with the contractual obligations of the parties. The arbitrator is also expected to conduct all proceedings in conformity with § 1404.4(b). The conduct of the arbitration proceeding is under the arbitrator's jurisdiction and control and the arbitrator's decision is to be based upon the evidence and testimony presented at the hearing or otherwise incorporated in the record of the proceeding. The arbitrator may, unless prohibited by law, proceed in the absence of any party who, after due notice, fails to be present or to obtain a postponement. An award rendered in an *ex parte* proceeding of this nature must be based upon evidence presented to the arbitrator.

§ 1404.15 Decision and award.

(a) Arbitrators are encouraged to render awards not later than 60 days from the date of the closing of the record as determined by the arbitrator, unless otherwise agreed upon by the parties or specified by law. A failure to render timely awards reflects upon the performance of an arbitrator and may lead to his removal from the FMCS roster.

(b) The parties should inform the OAS whenever a decision is unduly delayed. The arbitrator shall notify the OAS if and when the arbitrator (1) cannot schedule, hear and determine issues promptly, or (2) learns a dispute has been settled by the parties prior to the decision.

(c) After an award has been submitted to the parties, the arbitrator is required to submit a Fee and Award Statement, form R-19 showing a breakdown of the fee and expense charges so that the Service may be in a position to review conformance with stated charges under § 1404.12(a). Filing the Statement within 15 days after rendering an award is required of all arbitrators. The Statements are not used for the purpose of compelling payment of fees.

(d) The Service encourages the publication of arbitration awards. However, the Service expects arbitrators it has nominated or appointed not to give publicity to awards they issue if objected to by one of the parties.

[44 FR 13008, Mar. 9, 1979, as amended at 47 FR 9823, Mar. 8, 1982]

§ 1404.16 Fees and charges of arbitrators.

(a) No administrative or filing fee is charged by the Service. The current policy of the Service permits each of its nominees or appointees to charge a per diem fee and other predetermined fees for services, the amount of which has been certified in advance to the Service. Each arbitrator's maximum per diem fee and the existence of other predetermined fees, if any, are set forth on a biographical sketch which is sent to the parties when panels are submitted and are the controlling fees. The arbitrator shall not change any fee or add charges without giving at least 30 days advance notice to the Service.

(b) In cases involving unusual amounts of time and expenses relative to pre-hearing and post-hearing administration of a particular case, an administrative charge may be made by the arbitrator.

(c) All charges other than those specified by § 1404.16(a) shall be divulged to and agreement obtained by the arbitrator with the parties immediately after appointment.

(d) The Service requests that it be notified of any arbitrator's deviation from the policies expressed herein. However, the Service will not attempt to resolve any fee dispute.

§ 1404.17 Reports and biographical sketches.

(a) Arbitrators listed on the Roster shall execute and return all documents, forms and reports required by the Service. They shall also keep the Service informed of changes of address, telephone number, availability, and of any business or other connection or relationship which involves labor-management relations, or which creates or gives the appearance of advocacy as defined in § 1404.4(c)(1).

(b) The Service may require each arbitrator listed on the Roster to prepare at the time of initial listing, and to revise, biographical information in accordance with a format to be provided by the Service at the time of initial listing or biennial review. Arbitrators may also request revision of biographical information at other times to reflect changes in fees, the existence of additional charges, address, experience and background, or other relevant data. The Service reserves the right to decide and approve the format and content of biographical sketches.

PART 1405—PART-TIME EMPLOYMENT

Subpart A—General

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1405.2 Policy.
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1405.4 Applicability.

Subpart B—Part-time Employment Program

1405.6 Program coordination.
1405.7 Goals and timetables.
1405.8 Reporting.
1405.9 Part-time employment practices.
1405.10 Effect on employment ceilings.
1405.11 Effect on employee benefits.

AUTHORITY: Pub. L. 95-437, Federal Employees Part-time Career Employment Act of 1978.

SOURCE: 47 FR 15779, Apr. 13, 1982, unless otherwise noted.

Subpart A—General

§ 1405.1 Purpose.

These regulations implement Pub. L. 95-437, the Federal Employees Part-time Career Employment Act of 1978, by establishing a continuing program in the Federal Mediation and Conciliation Service (FMCS) to provide career part-time employment opportunities.

§ 1405.2 Policy.

It is the policy of FMCS to provide career part-time employment opportunities in positions through GS-16 (or equivalent) subject to agency resources and mission requirements.

§ 1405.3 Definition.

Part-time career employment means regularly scheduled work of from 16 to 32 hours per week performed by employees in competitive or excepted appointments in tenure groups I or II.

§ 1405.4 Applicability.

The regulations cover permanent positions which are deemed by management to be appropriately structured on a part-time basis. The regulations do not apply to positions at GS-16 (or equivalent) and above.

Subpart B—Part-time Employment Program

§ 1405.6 Program coordination.

The Director of Personnel is designated the FMCS Part-time Employment Coordinator with responsibility for:

(a) Consulting in the part-time employment program with the Director of Equal Employment Opportunity, Federal Women's Program Coordinator, Handicapped Program Coordinator, representatives of employee unions, and other interested parties;

(b) Responding to requests for advice and assistance on part-time employment within the agency;

(c) Maintaining liaison with groups interested in promoting part-time employment opportunities;

(d) Monitoring the agency's part-time employment efforts; and preparing reports on part-time employment for transmittal to OPM and the Congress.

§ 1405.7 Goals and timetables.

On an annual basis, as part of the manpower and budget process, management will set goals for establishing part-time positions to part-time along with a timetable setting forth interim and final deadlines for achieving the goals. Decisions on part-time employment will be based on such factors as agency mission, occupational mix, workload fluctuations, affirmative actions, geographic dispersion, effect on providing services to the public, and employee interest in part-time employment.

§ 1405.8 Reporting.

FMCS will report as required by regulations to the Office of Personnel Management on the part-time employment program. The program will be reviewed through internal personnel management evaluations.

§ 1405.9 Part-time employment practices.

FMCS will review positions which become vacant for the feasibility of utilizing part-time career appointments. Part-time positions will be advertised in vacancy announcements. Agency employees may request and receive consideration to switch from full-time to part-time schedules. The request should be addressed through the supervisor to the Director of Personnel listing any and all reasons for the request. The Director of Personnel, with input from all affected management officials, will decide whether or not to grant the request. Any employee requesting a change from full-time to part-time employment will be advised of effects on pay and fringe benefits by the Director of Personnel.

§ 1405.10 Effect on employment ceilings.

Effective October 1, 1980, part-time employees will be counted on the basis of the fractional part of the 40-hour week actually worked. For example two employees each working twenty hours a week will count as one employee.

§ 1405.11 Effect on employee benefits.

Career part-time employees are entitled to coverage under the Federal Employees Group Life Insurance and Federal Employees Health Benefits Programs. The Government contribution for health insurance of eligible part-time employees will be prorated on the basis of the fraction of a full-time schedule worked.

PART 1410—PRIVACY

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1410.4 Requirements for identification of individuals making requests.
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AUTHORITY: Privacy Act 1974, Pub. L. 93-579, 88 Stat. 1896 (5 USC 552a).

SOURCE: 40 FR 47418, Oct. 8, 1975, unless otherwise noted.

§ 1410.1 Purpose and scope.

(a) The purpose of this part is to set forth rules to inform the public about information maintained by the Federal Mediation and Conciliation Service about individuals, to inform those individuals how they may gain access to and correct or amend information about themselves, and to exempt disclosure of identity of confidential sources of certain records.

§ 1410.2 Definitions.

For the purposes of this part, unless otherwise required by the context—

(a) "Individual" means a citizen of the United States or an alien lawfully admitted for permanent residence.

(b) "Maintain" means maintain, collect, use or disseminate.

(c) "Record" means any item, collection or grouping of information about an individual that is maintained by the Federal Mediation and Conciliation Service including, but not limited to, his education, financial transactions, medical history, and criminal or employment history, that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print, or a photograph.

(d) "System of records" means a group of any records under the control of Federal Mediation and Conciliation Service from which information is retrieved by the name of the individual or by some identifying particular assigned to the individual.

§ 1410.3 Individual access requests.

(a) Individuals who desire to know whether the agency maintains a system of records containing records pertaining to him may submit a written request to the Director of Administration, Federal Mediation and Conciliation Service, Washington, D.C. 20427. The request must include the name and address of the requestor. The Director of Administration, or his designated representative, will advise the requestor in writing within 10 working days whether the records are so maintained and the general category of records maintained within the system.

(b) Any individual who desires to inspect or receive copies of any record maintained within the system concerning him shall submit a written request to the Director of Administration, Federal Mediation and Conciliation Service, Washington, D.C. 20427, reasonably identifying the records sought to be inspected or copied.

(c) The individual seeking access to his record may also have another person accompanying him during his review of the records. If the requestor desires another person to accompany him during the inspection, the requestor must sign a statement, to be furnished to the Service representative at the time of the inspection authorizing such other person to accompany him. Except as required under the Freedom of Information Act, permitted as a routine use as published in the agency's annual notice, or for internal agency use, disclosure of records will only be made to the individual to whom the record pertains, unless written consent is obtained from that individual. The Director of Administration will verify the signature of the individual requesting or consenting to the disclosure of a record prior to the disclosure thereof to any other person by a comparison of signatures, if the request or consent is not executed within the presence of a designated Service representative.

(d) The Director of Administration or his designated representative will advise the requestor in writing within 10 working days of receipt of the request whether, to what extent, and approximately when and where access shall be granted. Within 30 days of receipt of the request, the records will be made available for review at the FMCS National Office in Washington, D.C., or one of the Regional Offices. The following is a list of the Regional Office locations:

1. *Eastern Region:*

Address: Jacob K. Javits Federal Building, 26 Federal Plaza, Room 2937, New York, NY 10278.

Consists of: Maine, New Hampshire, Vermont, Connecticut, Rhode Island, Massachusetts, New York, Puerto Rico, the Virgin Islands, Pennsylvania, Delaware, New Jersey, Garrett and Alleghany Counties of Maryland; and Brooke and Hancock Counties of West Virginia.

2. *Central Region:*

Address: Insurance Exchange Building, Room 1641, 175 W. Jackson Street, Chicago, IL 60604.

Consist of: Illinois (except counties listed under the the Southern Region); Indiana (except counties listed under Southern Region); Wisconsin, Minnesota, North Dakota, South Dakota, Michigan, and Ohio (except counties listed under the Southern Region).

3. *Southern Region:*

Address: Suite 400, 1422 W. Peachtree St., NW., Atlanta, GA 30309.

Consists of: Virginia, Maryland (except counties listed under the Eastern Region); Tennessee; North Carolina; South Carolina; Georgia; Alabama; Florida; Mississippi; Louisiana; Arkansas; Kentucky; Texas (except for Hudspeth and El Paso counties); Oklahoma; Missouri (except for those counties listed for the Western Region); Illinois (in counties of Calhoun, Greene, Jersey, McCoupin, Montgomery, Fayette, Bond, Madison, St. Clair, Monroe, Clinton, Washington, Marion, White, Hamilton, Wayne, Edwards, Wabash, Lawrence, Richland, Clay, Effingham, Jasper, and Crawford); Indiana (the counties of Knox, Daviess, Martin, Orange, Washington, Clark, Floyd, Harrison, Crawford, Perry, Spencer, DuBois, Pike, Gibson, Posey, Vanderburgh, and Warrick); Ohio (the counties of Butler, Hamilton, Warren, Clermont, Brown, Highland, Clinton, Ross, Pike, Adams, Scioto, Lawrence, Ballia, Jackson, Vinton, Hocking, Athens, and Meigs); Kansas (the counties of Bourbon, Crawford, Cherokee, and Ottawa); West Virginia (except counties listed under the Central Region); and the Canal Zone.

4. *Western Region:*

Address: Francisco Bay Building, Suite 235, 50 Francisco Street, San Francisco, CA 94133.

Consists of: California; Nevada; Arizona; New Mexico; El Paso and Hudspeth Counties [only] in Texas; Hawaii; Guam; Alaska; Washington; Oregon; Colorado; Utah; Wyoming; Montana; Idaho; Nebraska; Kansas; Iowa; Missouri (the counties of Atchinson, Nodaway, Worth, Harrison, Mercer, Putnam, Schuyler, Scotland, Knox, Adair, Sullivan, Grundy, Daviess, Gentry, DeKalb, Andrew, Holt, Buchanan, Clinton, Caldwell, Livingston, Linn, Macon, Shelby, Randolph, Chariton, Carrol, Ray, Clay, Platte, Jackson, Lafayette, Saline, Howard, Boon, Cooper, Pettis, Johnson, Cass, Bates, Henry, St. Clair, Benton, and Morgan); American Somoa; and Wake Island.

[40 FR 47418, Oct. 8, 1975, as amended at 47 FR 10530, Mar. 11, 1982]

§ 1410.4 Requirements for identification of individuals making requests.

Satisfactory identification (i.e., employ identification number, current address, and verification of signature) must be provided to FMCS prior to review of the record. The requestor will be provided the opportunity to review the records during normal business hours.

§ 1410.5 Special procedures: Medical records.

(a) If medical records are requested for inspection which, in the opinion of the Director of Administration, may be harmful to the requestor if personally inspected by him, such records will be furnished only to a licensed physician, designated to receive such records by the requestor. Prior to such disclosure, the requestor must furnish a signed written authorization to the Service to make such disclosure and the physician must furnish a written request to the Director of Administration for the physician's receipt of such records.

(b) Verification of the requestor's signature will be accomplished by a comparison of signatures if such authorization is not executed within the presence of a Service representative.

§ 1410.6 Requests for correction or amendment of records.

(a) If the individual disagrees with the information in the record, he may request that the record be amended by addition or deletion. Such a request must be in writing and directed to the Director of Administration, Federal Mediation and Conciliation Service, Washington, D.C., 20427. The request must also specifically outline the amendment sought. The Director of Administration or his designated representative will acknowledge receipt of the request within 10 working days from the date of receipt of such request. Under normal circumstances, not later than 30 days after receipt of the request for amendments, the Director of Administration will either:

(1) Amend the record and notify the requestor in a written letter of determination to what extent the record is amended; or

(2) If the amendment or correction is denied in whole or in part, notify the requestor in a written letter of determination the reason for denial and the requestor's right to request review by the Deputy National Director.

(b) Routine requests of arbitrators maintained on the Service's roster of arbitrators to amend records for such matters as address, experience, fees charged, may be made in writing to the Director of Arbitration Services, Washington, D.C., 20427. If such routine requests are not granted or involve other types of amendments, then the procedure to be followed is that which includes a request in writing to the Director of Administration.

§ 1410.7 Agency review of refusal to amend a record.

(a) The requestor may appeal any determination of the Director of Administration not to amend a record by submitting a written request for review of refusal to amend a record to the Deputy National Director, Washington, D.C. 20427. Such a request shall indicate the specific corrections or amendments sought. Not later than 30 days from receipt of a request for review (unless such period is extended by the National Director for good cause shown), the Deputy National Director will complete such a review and make a final determination on the request, and shall advise the requestor in a written letter of determination whether, and to what extent the correction or amendment will be made. If the correction or amendment is denied, in whole or in part, the letter of determination will specify the reasons for such denial.

(b) If the Deputy National Director makes a final determination not to amend the record, the individual may provide to the Service a concise written statement explaining the reasons for disagreement with the refusal.

(c) In addition, the individual may file a civil action in the U.S. District Court to seek an order compelling the Service to amend the record as requested.

§ 1410.8 Notation of dispute.

After an individual has filed a statement of disagreement as described in § 1410.7(b), any disclosure of the contested records must contain a notation of the dispute. In addition, a copy of the individual's statement will be provided to the person or agency to whom the disputed record is disclosed. The Service may also, but it is not required to, provide a statement reflecting the agency's reasons for not making the requested amendments.

§ 1410.9 Fees.

Upon request, the Service will provide a photostatic copy of the records to the individual to whom they pertain. There will be a charge of $.10 per page.

§ 1410.10 Penalties.

Any person who knowingly and willfully requests or obtains any record concerning an individual from the Service under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

§ 1410.11 Standards of review.

Upon a request for inspection of records or a determination on a request for amendment, the Director of Administration, his designated representative, or the Deputy National Director will review the pertinent records and discard any material in them that is not:

(a) Relevant and necessary to accomplish a statutory purpose or a purpose not authorized by executive order.

(b) Accurate, relevant, timely, and complete, to assure fairness to the individual.

§ 1410.12 Specific exemptions.

With regard to Agency Internal Personnel Records and Arbitrator Personal Data Files, separately described in the system notices, such records will be exempted from section (d) of the Act as follows:

Investigatory material maintained solely for the purposes of determining an individual's qualification, eligibility, or suitability for employment in the Federal civilian service, Federal contracts, or access to classified information, but only to the extent that disclosure of such material would reveal the identity of the source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence.

In order to obtain accurate information pertaining to employee or arbitrator eligibility, the nondisclosure of the identity of such a confidential source is essential.

PART 1420—FEDERAL MEDIATION AND CONCILIATION SERVICE—ASSISTANCE IN THE HEALTH CARE INDUSTRY

Sec.

1420.1 Functions of the Service in health care industry bargaining under the Labor-Management Relations Act, as amended (hereinafter "the Act").
1420.2-1420.4 [Reserved]
1420.5 Optional input of parties to Board of Inquiry selection.
1420.6-1420.7 [Reserved]
1420.8 FMCS deferral to parties' own private factfinding procedures.
1420.9 FMCS deferral to parties' own private interest arbitration procedures.

AUTHORITY: Secs. 8(d), 201, 203, 204, and 213 of the Labor Management Relations Act, as amended in 1974 (29 U.S.C. 158(d), 171, 173, 174 and 183).

SOURCE: 44 FR 42683, July 20, 1979, unless otherwise noted.

§ 1420.1 Functions of the Service in health care industry bargaining under the Labor-Management Relations Act, as amended (hereinafter "the Act").

(a) *Dispute Mediation.* Whenever a collective bargaining dispute involves employees of a health care institution, either party to such collective bargaining must give certain statutory notices to the Federal Mediation and Conciliation Service (hereinafter "the Service") before resorting to strike or lockout and before terminating or modifying any existing collective bargaining agreement. Thereafter, the Service will promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be called by the Service for the purpose of aiding in a settlement of the dispute. (29 U.S.C. Sections 158(d) and 158(g).).

(b) *Boards of Inquiry.* If, in the opinion of the Director of the Service a threatened or actual strike or lockout affecting a health care institution will substantially interrupt the delivery of health care in the locality concerned, the Director may establish within certain statutory time periods an impartial Board of Inquiry. The Board of Inquiry will investigate the issues involved in the dispute and make a written report, containing the findings of fact and the Board's non-binding recommendations for settling the dispute, to the parties within 15 days after the establishment of such a Board. (29 U.S.C. 183.)

§§ 1420.2—1420.4 [Reserved]

§ 1420.5 Optional input of parties to Board of Inquiry selection.

The Act gives the Director of the Service the authority to select the individual(s) who will serve as the Board of Inquiry if the Director decides to establish a Board of Inquiry in a particular health care industry bargaining dispute (29 U.S.C. 183). If the parties to collective bargaining involving a health care institution(s) desire to have some input to the Service's selection of an individual(s) to serve as a Board of Inquiry (hereinafter "BoI"), they may jointly exercise the following optional procedure: (a) At any time at least 90 days prior to the expiration date of a collective bargaining agreement in a contract renewal dispute, or at any time prior to the notice required under clause (B) of Section 8(d) of the Act (29 U.S.C. 158(d)) in an initial contract dispute, the employer(s) and the union(s) in the dispute may jointly submit to the Service a list of arbitrators or other impartial individuals who would be acceptable BoI members both to the employer(s) and to the union(s). Such list submission must identify the dispute(s) involved and must include addresses and telephone numbers of the individuals listed and any information available to the parties as to current and past employment of the individuals listed. The parties may jointly rank the individuals in order of preference if they desire to do so.

(b) The Service will make every effort to select any BoI that might be appointed from that jointly submitted list. However, the Service cannot promise that it will select a BoI from such list. The chances of the Service finding one or more individuals on such list available to serve as the BoI will be increased if the list contains a sufficiently large number of names and if it is submitted at as early a date as possible. Nevertheless, the parties can even preselect and submit jointly to the Service one specific individual if that individual agrees to be available for the particular BoI time period. Again the Service will not be bound to appoint that individual, but will be receptive to such a submission by the parties.

(c) The jointly submitted list may be worked out and agreed to by (1) A particular set of parties in contemplation of a particular upcoming negotiation dispute between them, or (2) a particular set of parties for use in all future disputes between that set of parties, or (3) a group of various health care institutions and unions in a certain community or geographic area for use in all disputes between any two or more of those parties.

(d) Submission or receipt of any such list will not in any way constitute an admission of the appropriateness of appointment of a BoI nor an expression of the desirability of a BoI by any party or by the Service.

(e) This joint submission procedure is a purely optional one to provide the parties with an opportunity to have input into the selection of a BoI if they so desire.

(f) Such jointly submitted lists should be sent jointly by the employer(s) and the union(s) to the appropriate regional office of the Service. The regional offices of the Service are as follows:

1. *Eastern Region:*

Address: Jacob K. Javits Federal Building, 26 Federal Plaza, Room 2937, New York, NY 10278.

Consists of: Maine, New Hampshire, Vermont, Connecticut, Rhode Island, Massachusetts, New York, Puerto Rico, the Virgin Islands, Pennsylvania, Delaware, New Jersey, Garrett and Alleghany Counties of Maryland; and Brooke and Hancock Counties of West Virginia.

2. *Central Region:*

Address: Insurance Exchange Building, Room 1641, 175 W. Jackson Street, Chicago, IL 60604.

Consist of: Illinois (except counties listed under the the Southern Region); Indiana (except counties listed under Southern Region); Wisconsin, Minnesota, North Dakota, South Dakota, Michigan, and Ohio (except counties listed under the Southern Region).

3. *Southern Region:*

Address: Suite 400, 1422 W. Peachtree St., NW., Atlanta, GA 30309.

Consists of: Virginia, Maryland (except counties listed under the Eastern Region); Tennessee; North Carolina; South Carolina; Georgia; Alabama; Florida; Mississippi; Louisiana; Arkansas; Kentucky; Texas (except for Hudspeth and El Paso counties); Oklahoma; Missouri (except for those counties listed for the Western Region); Illinois (in counties of Calhoun, Greene, Jersey, McCoupin, Montgomery, Fayette, Bond, Madison, St. Clair, Monroe, Clinton, Washington, Marion, White, Hamilton, Wayne, Edwards, Wabash, Lawrence, Richland, Clay, Effingham, Jasper, and Crawford); Indiana (the counties of Knox, Daviess, Martin, Orange, Washington, Clark, Floyd, Harrison, Crawford, Perry, Spencer, DuBois, Pike, Gibson, Posey, Vanderburgh, and Warrick); Ohio (the counties of Butler, Hamilton, Warren, Clermont, Brown, Highland, Clinton, Ross, Pike, Adams, Scioto, Lawrence, Ballia, Jackson, Vinton, Hocking, Athens, and Meigs); Kansas (the counties of Bourbon, Crawford, Cherokee, and Ottawa); West Virginia (except counties listed under the Central Region); and the Canal Zone.

4. *Western Region:*

Address: Francisco Bay Building, Suite 235, 50 Francisco Street, San Francisco, CA 94133.

Consists of: California; Nevada; Arizona; New Mexico; El Paso and Hudspeth Counties [only] in Texas; Hawaii; Guam; Alaska; Washington; Oregon; Colorado; Utah; Wyoming; Montana; Idaho; Nebraska; Kansas; Iowa; Missouri (the counties of Atchinson, Nodaway, Worth, Harrison, Mercer, Putnam, Schuyler, Scotland, Knox, Adair, Sullivan, Grundy, Daviess, Gentry, DeKalb, Andrew, Holt, Buchanan, Clinton, Caldwell, Livingston, Linn, Macon, Shelby, Randolph, Chariton, Carrol, Ray, Clay, Platte, Jackson, Lafayette, Saline, Howard, Boon, Cooper, Pettis, Johnson, Cass, Bates, Henry, St. Clair, Benton, and Morgan); American Somoa; and Wake Island.

[44 FR 42683, July 20, 1979, as amended at 47 FR 10530, Mar. 11, 1982]

§§ 1420.6–1420.7 [Reserved]

§ 1420.8 FMCS deferral to parties' own private factfinding procedures.

(a) The Service will defer to the parties' own privately agreed to factfinding procedure and decline to appoint a Board of Inquiry (BoI) as long as the parties' own procedure meets certain conditions so as to satisfy the Service's responsibilities under the Act. The Service will decline to appoint a BoI and leave the selection and appointment of a factfinder to the parties to a dispute if both the parties have agreed in writing to their own factfinding procedure which meets the following conditions:

(1) The factfinding procedure must be invoked automatically at a specified time (for example, at contract expiration if no agreement is reached).

(2) It must provide a fixed and determinate method for selecting the impartial factfinder(s).

(3) It must provide that there can be no strike or lockout and no changes in conditions of employment (except by mutual agreement) prior to or during the factfinding procedure and for a period of at least seven days after the factfinding is completed.

(4) It must provide that the factfinder(s) will make a written report to the parties, containing the findings of fact and the recommendations of the factfinder(s) for settling the dispute, a copy of which is sent to the Service. The parties to a dispute who have agreed to such a factfinding procedure should jointly submit a copy of such agreed upon procedure to the appropriate regional office of the Service at as early a date as possible, but in any event prior to the appointment of a BoI by the Service. See § 1420.5(f) for the addresses of the regional offices.

(b) Since the Service does not appoint the factfinder under paragraph (a) of this section, the Service cannot pay for such factfinder. In this respect, such deferral by the Service to the parties' own factfinding procedure is different from the use of stipulation agreements between the parties which give to the Service the authority to select and appoint a factfinder at a later date than the date by which a BoI would have to be appointed under the Act. Under such stipulation agreements by which the parties give the Service authority to appoint a factfinder at a later date, the Service can pay for the factfinder. However, in the deferral to the parties' own factfinding procedure, the parties choose their own factfinder and they pay for the factfinder.

§ 1420.9 FMCS deferral to parties' own private interest arbitration procedures.

(a) The Service will defer to the parties' own privately agreed to interest arbitration procedure and decline to appoint a Board of Inquiry (BoI) as long as the parties' own procedure meets certain conditions so as to satisfy the Service's responsibilities under the Act. The Service will decline to appoint BoI if the parties to a dispute have agreed in writing to their own interest arbitration procedure which meets the following conditions:

(1) The interest arbitration procedure must provide that there can be no strike or lockout and no changes in conditions of employment (except by mutual agreement) during the contract negotiation covered by the interest arbitration procedure and the period of any subsequent interest arbitration proceedings.

(2) It must provide that the award of the arbitrator(s) under the interest arbitration procedure is final and binding on both parties.

(3) It must provide a fixed and determinate method for selecting the impartial interest arbitrator(s).

(4) The interest arbitration procedure must provide for a written award by the interest arbitrator(s).

(b) The parties to a dispute who have agreed to such an interest arbitration procedure should jointly submit a copy of their agreed upon procedure to the appropriate regional office of the Service at as early a date as possible, but in any event prior to the appointment of BoI by the Service. See § 1420.5(f) for the addresses of regional offices.

These new regulations are a part of the Service's overall approach to implementing the health care amendments of 1974 in a manner consistent with the Congressional intent of promoting peaceful settlements of labor disputes at our vital health care facilities. The Service will work with the parties in every way possible to be flexible and to tailor its approach so as to accommodate the needs of the parties in the interest of settling the dispute. This was the motivating principle behind these new regulations which permit input by the parties to the Board of Inquiry selection and allow the parties to set up their own factfinding or arbitration procedures in lieu of the Board of Inquiry procedure. We encourage the parties, both unions and management, to take advantage of these and other options and to work with the Service to tailor their approach and procedures to fit the needs of their bargaining situations.

PART 1425—MEDIATION ASSISTANCE IN THE FEDERAL SERVICE

Sec.
1425.1 Definitions.
1425.2 Notice to the Service of agreement negotiations.
1425.3 Functions of the Service under Title VII of the Civil Service Reform Act.
1425.4 Duty of parties.
1425.5 Referral to FSIP.
1425.6 Use of third-party mediation assistance.

AUTHORITY: 5 U.S.C. 7119, 7134.

SOURCE: 45 FR 62798, Sept. 22, 1980, unless otherwise noted.

§ 1425.1 Definitions.

As used in this part:

(a) "The Service" means Federal Mediation and Conciliation Service.

(b) "Party" or "Parties" means (1) any appropriate activity, facility, geographical subdivision, or combination thereof, of an agency as that term is defined in 5 U.S.C. 7103(3), or (2) a labor organization as that term is defined in 5 U.S.C. 7103(4).

(c) "Third-party mediation assistance" means mediation by persons other than FMCS commissioners.

(d) "Provide its services" means to make the services and facilities of the Service available either on its own motion or upon the special request of one or both of the parties.

§ 1425.2 Notice to the Service of agreement negotiations.

In order that the service may provide assistance to the parties, the party initiating negotiations shall file a notice with the FMCS Division of Case Control, 2100 K Street, NW., Washington, D.C. 20427, at least 30 days prior to the expiration or modification date of an existing agreement. Parties entering negotiations for an initial agreement shall file such notice within 30 days after commencing negotiations. Parties engaging in midterm or impact bargaining need not submit a notice.

The following form, FMCS Form F-53, has been prepared by the Service for use by the parties:

FMCS FORM F-53
Revised July 1979

Form Approved
OMB No. 023R 0006

NOTICE TO FEDERAL MEDIATION AND CONCILIATION SERVICE

(Pursuant to FMCS Regulations Published in CFR 1425.3)

Date ....

To: FEDERAL MEDIATION AND CONCILIATION SERVICE, Washington, D.C., 20427.

1. You are hereby notified that we desire to (check one):
   - ☐ Enter into an initial agreement ....
   - ☐ Amend, modify, or terminate an existing agreement ....

2. Name of Agency ....
Name of Bureau or Activity ....
Agency Official to be Contacted ....
Address ....
Telephone —— (Area Code) ——— (Number)

3. Name of Union and Local No. ....
Union Official to be Contacted ....
Address ....
Telephone —— (Area Code) ——— (Number)

4. Date exclusive recognition granted ....

5. Number of employees in bargaining unit(s) ....

6. Agreement expiration /OR/ reopening date ....

. Name of official filing this notice ....
Title of official ....
Address ....
Telephone —— (Area Code) ——— (Number)

8. Check on whose behalf this notice is filed: Union ——— Agency ———

(Signature) ....

Receipt of this notice does not constitute a request for mediation nor does it commit the agency to offer its facilities. This particular form of notice is not legally required. Receipt of notice will not be acknowledged in writing by the Federal Mediation and Conciliation Service.

TO FMCS, Washington, D.C. 20427.

[45 FR 62798, Sept. 22, 1980, as amended at 47 FR 10531, Mar. 11, 1982]

§ 1425.3 Functions of the Service under Title VII of the Civil Service Reform Act.

(a) The service may provide its assistance in any negotiation dispute when earnest efforts by the parties to reach agreement through direct negotiation have failed to resolve the dispute. When the existence of a negotiation dispute comes to the attention of the Service through a specific request for mediation from one or both of the parties, through notification under the provisions of § 1425.2, or otherwise, the Service will examine the information concerning the dispute and if, in its opinion, the need for mediation exists, the Service will use its best efforts to assist the parties to reach agreement.

(b) The Service may, at the outset of negotiations or at any time in the dispute, set time limits on its participation. If no settlement of the dispute is reached by the expiration of the time limits, the Service may make suggestions for settlement to the parties. If suggestions for settlement made by the Service are not accepted by the parties within time limits set by the Service, the matter may be referred to the Federal Services Impasses Panel (FSIP).

§ 1425.4 Duty of parties.

It shall be the duty of the parties to participate fully and promptly in any meetings arranged by the Service for the purpose of assisting in the settlement of a negotiation dispute.

§ 1425.5 Referral to FSIP.

If the mediation process has been completed and the parties are at a negotiation impasse, the Service or the parties may request consideration of the matter by the Federal Services Impasses Panel. The Service shall not refer a case to FSIP until the mediation process has been exhausted and the parties are at a negotiation impasse.

§ 1425.6 Use of third-party mediation assistance.

If the parties should mutually agree to third-party mediation assistance other than that of the Service, both parties shall immediately inform the Service in writing of this agreement. Such written communication shall be filed with the regional director of the region in which the negotiation is scheduled, and shall state what alternate assistance the parties have agreed to use.

PART 1430—FEDERAL MEDIATION AND CONCILIATION SERVICE ADVISORY COMMITTEES

Sec.
1430.1 Scope and purpose.
1430.2 Definitions.
1430.3 Establishment of advisory committees.
1430.4 Filing of advisory committee charter.
1430.5 Termination of advisory committees.
1430.6 Renewal of advisory committees.
1430.7 Application of the Freedom of Information Act to advisory committee functions.
1430.8 Advisory committee meetings.
1430.9 Agency management of advisory committees.

AUTHORITY: Pub. L. 92-463, 86 Stat. 770 (5 U.S.C. App.), unless otherwise noted.

SOURCE: 39 FR 9433, Mar. 11, 1974, unless otherwise noted.

§ 1430.1 Scope and purpose.

(a) This part contains the Federal Mediation and Conciliation Service's regulations implementing section 8(a) of the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770, (5 U.S.C. App.)), which requires each agency head to establish uniform guidelines and management controls for the advisory committees. These regulations supplement the Government-wide guidelines issued jointly by the Office of Management and Budget and the Department of Justice, and should be read in conjunction with them.

(b) The regulations provided under this part do not apply to statutorily created or established advisory committees of the Service, to the extent that such statutes have specific provisions different from those promulgated herein.

§ 1430.2 Definitions.

For the purposes of this part:

(a) The term "Act" means the Federal Advisory Committee Act;

(b) The term "advisory committee" means any committee, board, commission, counsel, conference, panel, task force, or other similar group, or any subgroup or subcommittee thereof which is:

(1) Established by statute or reorganization, plan, or

(2) Established or utilized by the President, or

(3) Established or utilized by one or more agencies or officers of the Federal Government in the interest of obtaining advice or recommendations for the President or one or more agencies of the Federal Government, except that such term excludes:

(i) The Advisory Commission on Intergovernmental Relations;

(ii) The Commission on Government Procurement; and

(iii) Any committee which is composed wholly of full-time officers or employees of the Federal Government.

(c) The term "agency" has the same meaning as in 5 U.S.C. 552(1);

(d) The term "committee management officer" means the Federal Mediation and Conciliation Service employee or his delegee, officially designated to perform the advisory committee management functions delineated in this part;

(e) The term "Service" means the Federal Mediation and Conciliation Service;

(f) The term "OMB" means the Office of Management and Budget;

(g) The term "Director" means the Director of the Federal Mediation and Conciliation Service;

(h) The term "secretariat" means the OMB Committee Management Secretariat.

§ 1430.3 Establishment of advisory committees.

(a) *Guidelines for establishing advisory committees.* The guidelines in establishing advisory committees are as follows:

(1) No advisory committee shall be established if its functions are being or could be performed by an agency or an existing committee;

(2) The purpose of the advisory committee shall be clearly defined;

(3) The membership of the advisory committee shall be fairly balanced in terms of the points of view represented and the committee's functions;

(4) There shall be appropriate safeguards to assure that an advisory committee's advice and recommendations will not be inappropriately influenced by any special interests; and

(5) At least once a year, a report shall be prepared for each advisory committee, describing the committee's membership, functions, and actions.

(b) *Advisory committees established by the Service not pursuant to specific statutory authority.* (1) Advisory committees established by the Service not pursuant to specific statutory authority may be created by the Director after consultation with the secretariat.

(2) When the Director determines that such an advisory committee needs to be established, he shall notify the secretariat of his determination and shall inform the secretariat of the nature and purpose of the committee, the reasons why the committee is needed, and the inability of any existing agency or committee to perform the committee's functions.

(3) After the secretariat has determined that establishment of such a committee is in conformance with the Act and has so informed the Director, the Director shall prepare a certification of the committee, stating the committee's nature and purpose, and that it is established in the public interest. That certification shall be published in the FEDERAL REGISTER.

(c) *Advisory committees created pursuant to Presidential directive.* Advisory committees established by Presidential directive are those created pursuant to Executive Order, executive memorandum, or reorganization plan. The Director shall create such committees in accordance with the provisions of the Presidential directive and shall follow the provisions of this part, to the extent they are not inconsistent with the directive.

(d) *Advisory committees created pursuant to specific statutory authority.* The Director shall create advisory committees established pursuant to specific statutory authority in accordance with the provisions of the statute and shall follow the provisions of this part, to the extent they are not inconsistent with the statute: *Provided, however*, That the Director need not utilize the procedures described in paragraph (b) of this section.

(c) *Advisory committees established by persons outside the Federal Government, but utilized by the Service to obtain advice or opinion.* In utilizing such committees, the Director shall follow the provisions of this part and the requirements of the Act. Such committees, to the extent they are utilized by the Service, shall be considered, for the purposes of this part, to be advisory committees established by the Service.

§ 1430.4 Filing of advisory committee charter.

(a) *Filing charter with Director.* Before an advisory committee takes any action or conducts any business, a charter shall be filed with the Director, the standing committees of Congress with legislative jurisdiction over the Service, and the Library of Congress. Except for a committee in existence on the effective date of the Act, or when authorized by statute, Presidential directive, or by the secretariat, such charter shall be filed no earlier than 30 days after publication of the committee's certification in the FEDERAL REGISTER.

(b) *Charter information.* A charter shall contain the following information:

(1) The committee's official designation;

(2) The committee's objectives and scope of activity;

(3) The period of time necessary for the committee to carry out its purposes;

(4) The agency or official to whom the advisory committee reports;

(5) The agency responsible for providing necessary support;

(6) A description of the committee's duties;

(7) The estimated number and frequency of committee meetings;

(8) The estimated annual operating costs in dollars and man-years;

(9) The committee's termination date, if less than two years; and

(10) The date the charter is filed.

(c) *Preparation and filing of initial charter.* Responsibility for preparation of the initial committee charter shall be with the head of the appropriate program within the Service, in cooperation with the committee management officer. The Director of Administration shall have responsibility for assuring the appropriate filings of such charters.

§ 1430.5 Termination of advisory committees.

(a) All nonstatutory advisory committees including those authorized, but not specifically created by statute, shall terminate no later than 2 years after their charters have been filed, unless renewed as provided in § 1430.6.

(b) The charter of any committee in existence on the date the Act became effective (January 5, 1973) shall terminate no later than January 5, 1975, unless renewed, as provided in § 1430.6.

(c) Advisory committees specifically created by statute shall terminate as provided in the establishing statute.

§ 1430.6 Renewal of advisory committees.

(a) Renewal of advisory committees not created pursuant to specific statutory authority.

(1) The Director may renew an advisory committee not created pursuant to specific statutory authority after consultation with the secretariat.

(2) When the Director determines that such an advisory committee should be renewed, he shall so advise the secretariat within 60 days prior to the committee's termination date and shall state the reasons for his determination.

(3) Upon concurrence of the secretariat, the Director shall publish notice of the renewal in the FEDERAL REGISTER and cause a new charter to be prepared and filed in accordance with the provisions of § 1430.3.

(b) Renewal of advisory committees established pursuant to specific statutory authority. The Director may renew advisory committees established pursuant to specific statutory authority through the filing of a new charter at appropriate 2-year intervals.

(c) No advisory committee shall take any action or conduct any business during the period of time between its termination date and the filing of its renewal charter.

§ 1430.7 Application of the Freedom of Information Act to advisory committee functions.

(a) Subject to 5 U.S.C. 552, the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, and other documents which are made available to or are prepared for or by an advisory committee shall be available to the public.

(b) Advisory committee meeting conducted in accordance with § 1430.7 may be closed to the public when discussing a matter that is of a 5 U.S.C. 552(b) nature, whether or not the discussion centers on a written document.

(c) No record, report, or other document prepared for or by an advisory committee may be withheld from the public unless the Office of the General Counsel determines that the document is properly within the exemptions of 5 U.S.C. 552(b). No committee meeting, or portion thereof, may be closed to the public unless the Office of the General Counsel determines in writing, prior to publication of the meeting in the FEDERAL REGISTER that such a closing is within the exemptions of 5 U.S.C. 552(b).

§ 1430.8 Advisory committee meetings.

(a) *Initiation of meetings.* (1) Committee meetings may be called by:

(i) The Director or the head of the office most directly concerned with the committee's activities;

(ii) The agency officer referred to in paragraph (a)(1)(i) of this section, and the committee chairman, jointly; or

(iii) The committee chairman, with the advance approval of the officer referred to in paragraph (a)(1)(i) of this section.

(2) The Service's committee management officer shall be promptly informed that a meeting has been called.

(b) *Agenda.* Committee meetings shall be based on agenda approved by the officer referred to in paragraph (a)(1) of this section. Such agenda shall note those items which may involve matters which have been determined by the Office of the General Counsel as coming within the exemptions to the Freedom of Information Act, 5 U.S.C. 552(b).

(c) *Notice of meetings.* (1) Notice of advisory committee meetings shall be published in the FEDERAL REGISTER at least 7 days before the date of the meeting, irrespective of whether a particular meeting will be open to the public. Notice to interested persons shall also be provided in such other reasonable ways as are appropriate under the circumstances, such as press release or letter. Responsibility for preparation of FEDERAL REGISTER and other appropriate notice shall be with the officer referred to in paragraph (a)(1) of this section.

(2) Notice in the FEDERAL REGISTER shall state all pertinent information related to a meeting and shall be published at least 7 days prior to a meeting.

(d) *Presence of agency officer or employee at meetings.* No committee shall meet without the presence of the officer referred to in paragraph (a)(1) of this section, or his delegate. At his option the officer or employee may elect to chair the meeting.

(e) *Minutes.* Detailed minutes shall be kept of all committee meetings and shall be certified by the chairman of the advisory committee as being accurate.

(f) *Adjournment.* The officer or employee referred to in paragraph (a)(1) of this section may adjourn a meeting at any time he determines it in the public interest to do so.

(g) *Public access to committee meetings.* All advisory committee meetings shall be open to the public, except when the Office of the General Counsel determines, in writing, and states his reasons therefor prior to FEDERAL REGISTER notice, that a meeting or any part thereof, is concerned with matters related to the exemptions provided in the Freedom of Information Act, 5 U.S.C. 552(b). In such instances, those portions of a committee meeting which come within the section 552(b) exemptions may be closed to the public.

(h) *Public participation in committee procedures.* Interested persons shall be permitted to file statements with advisory committees. Subject to reasonable committee procedures, interested persons may also be permitted to make oral statements on matters germane to the subjects under consideration at the committee meeting.

§ 1430.9 Agency management of advisory committees.

Consistent with the other provisions of this part, the Service's advisory committee management officer shall:

(a) Exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by the Service;

(b) Assemble and maintain the reports, records, and other papers of advisory committees, during their existence;

(c) Carry out, with the concurrence of the Office of the General Counsel, the provisions of the Freedom of Information Act, as those provisions apply to advisory committees;

(d) Have available for public inspection and copying all pertinent documents of advisory committees which are within the purview of the Freedom of Information Act; and

(e) When transcripts have been made of advisory committee meetings, provide for such transcripts to be made available to the public at actual cost of duplication, except where prohibited by contractual agreements entered into prior to January 5, 1973, the effective date of the Federal Advisory Committee Act.

PART 1440—ARBITRATION OF PESTICIDE DATA DISPUTES

Sec.
1440.1 Arbitration of pesticide data disputes.
APPENDIX—FIFRA ARBITRATION RULES

AUTHORITY: Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.), as amended, Pub. L. 95-396, 92 Stat. 819.

SOURCE: 45 FR 55395, Aug. 19, 1980, unless otherwise noted.

§ 1440.1 Arbitration of Pesticide Data Disputes.

(a) Persons requesting the appointment of an arbitrator under Section 3(c)(1)(D)(ii) and Section 3(c)(2)(B)(iii) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136, as amended), shall send such requests in writing to the appropriate American Arbitration Association Regional Office. Such requests must include the names, addresses, and telephone numbers of the parties to the dispute; issue(s) in dispute, the amount in dollars or any other remedy sought; sufficient facts to show that the statutory waiting period has passed, and the appropriate fee provided in the Fee Schedule.

(b) For the purpose of compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (hereinafter "the Act"), the roster of arbitrators maintained by the Federal Mediation and Conciliation Service shall be the roster of commerical arbitrators maintained by the American Arbitration Association. Under this Act, arbitrators will be appointed from that roster. The fees of the American Arbitration Association shall apply, and the procedure and rules of the Federal Mediation and Conciliation Service, applicable to arbitration proceedings under the Act, shall be the FIFRA arbitration rules of the American Arbitration Association, which are hereby made a part of this regulation.

APPENDIX—FIFRA ARBITRATION RULES

Section 1

These rules shall apply as published in the FEDERAL REGISTER unless modified by FMCS.

Sec. 2. Definitions

For the purpose of these Rules of Procedure the terms are defined as follows:

(1) "AAA" means the American Arbitration Association.

(2) "Act" or "FIFRA" means the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*

(3) "EPA" means the United States Environmental Protection Agency.

(4) "Arbitrator(s)" means the person or persons appointed to the tribunal constituted by the parties for the set-

tlement of their dispute under these Rules.

(5) "Claimant" means a person asserting a claim for compensation under these Rules or filing a claim concerning joint development of data.

(6) "Compulsory arbitration" means arbitration invoked under the mandatory provisions of section 3(c)(1)(d) or 3(c)(2)(B)(iii) of the Act.

(7) "Voluntary arbitration" means arbitration voluntarily agreed to by the parties to settle a dispute under section 3(c)(1)(d) or 3(c)(2)(B)(iii) of the Act.

(8) "Director" means Director, Registration Division, Office of Pesticide Programs, Environmental Protection Agency, or any officer or employee of the EPA to whom authority has been or may hereafter be lawfully delegated to act in his stead.

(9) "Administator" means the AAA, its Tribunal Administrators or such officers or committees as the AAA may direct.

(10) "Roster" means the Commercial Arbitration Roster of AAA.

(11) "FMCS" or "Service" means the Federal Mediation and Conciliation Service.

(12) "Party" means claimant or respondent.

(13) "Person" means any individual, partnership, association, corporation, or any organized group of persons, whether incorporated or not.

(14) "Respondent" means the person against whom a claim is made under section 3(c)(1)(D) or 3(c)(2)(B)(iii) of the Act.

Terms defined in the Act and not explicitly defined herein are used herein with the meanings given in the Act.

Sec. 3. Initiation of Arbitration

(a) *Under compulsory procedures of FIFRA.* Upon the request of a party qualified under FIFRA § 3(c)(1)(D) or 3(c)(2)(B)(iii) for the appointment of an arbitrator, the Service will appoint an arbitrator in accordance with 29 CFR § 1440(a) and these rules. Requests shall be submitted in writing to the appropriate AAA Regional Office and must include the names, addresses and telephone numbers of the parties to the dispute; issues in dispute; the amount in dollars or any other remedy sought; sufficient facts to show that the statutory waiting period has passed; and the appropriate fee as provided in the Fee Schedule.

AAA shall give notice of filing of a request for arbitration to the other party. If he so desires, the party upon whom the demand for arbitration is made may file an answering statement in duplicate with AAA within seven days after notice, in which event he shall simultaneously send a copy of his answer to the other party. If a monetary claim is made in the answer the appropriate fee provided in the Fee Schedule shall be forwarded with the answer. If no answer is filed within the stated time, it will be assumed that the claim is denied. Failure to file an answer shall not operate to delay the arbitration.

(b) *Under a Voluntary Submission.*—Parties to any existing dispute may commence an arbitration under these Rules by filing at any AAA Regional Office two (2) copies of a written agreement to arbitrate under these Rules (Submission), signed by the parties. It shall contain a statement of the matter in dispute, the amount of money involved, if any, and the remedy sought, together with the appropriate administrative fee as provided in the Fee Schedule.

Sec. 4—Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If the locale is not designated within seven days from the date of filing the Demand or Submission the AAA shall have power to determine the locale. Its decision shall be final and binding. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within seven days after notice of the requests, the locale shall be the one requested.

Sec. 5—Qualification of Arbitrator

Any Arbitrator appointed pursuant to these rules shall be neutral, subject to disqualification for the reasons specified in Section 11. If the agreement of the parties names an Arbitrator or specifies any other method of appointing an Arbitrator, or if the parties specifically agree in writing, such Arbitrator shall not be subject to disqualification for said reasons.

Sec. 6—Appointment From Panel

If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner. Immediately after the filing of the Request or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names to which he objects, number the remaining names indicating the order of his preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve, and the Service shall appoint the Arbitrator. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the FMCS shall have the power to make the appointment from other members of the Panel without the submission of any additional lists.

Sec. 7—Direct Appointment by Parties

If the agreement of the parties to a Submission names an Arbitrator or specifies a method of appointment of an Arbitrator, that designation or method shall be followed. The notice of appointment, with name and address of such Arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any such appointing party, the AAA shall submit a list of members from the Panel from which the party may, if he so desires, make the appointment.

If the agreement specifies a period of time within which an Arbitrator shall be appointed, and any party fails to make such appointment within that period, the AAA shall make the appointment.

Sec. 8—Appointment of Neutral Arbitrator by Party Appointed Arbitrators

If the parties have appointed their Arbitrators or if either or both of them have been appointed as provided in Section 7, and have authorized such Arbitrators to appoint a neutral Arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof, the FMCS shall appoint a neutral Arbitrator who shall act as Chairman.

If no period of time is specified for appointment of the neutral Arbitrator and the parties do not make the appointment within seven days from the date of the appointment of the last party-appointed Arbitrator, the FMCS shall appoint such neutral Arbitrator, who shall act as Chairman.

If the parties have agreed that their Arbitrators shall appoint the neutral Arbitrator from the Panel, the AAA shall furnish to the party-appointed Arbitrators, in the manner prescribed in Section 6, a list selected from the Panel, and the appointment of the neutral Arbitrator shall be made as prescribed in such Section.

Sec. 9—Number of Arbitrators

If the arbitration agreement does not specify the number of Arbitrators, the dispute shall be heard and determined by one Arbitrator, unless the AAA in its discretion, directs that a greater number of Arbitrators be appointed.

Sec. 10—Notice to Arbitrator of His or Her Appointment

Notice of the appointment of the neutral Arbitrator, whether appointed by the parties, by the AAA or FMCS shall be mailed to the Arbitrator, together with a copy of these Rules, and the signed acceptance of the Arbitrator shall be filed with AAA prior to the opening of the first hearing.

Sec. 11—Disclosure and Challenge Procedure

A person appointed as neutral Arbitrator shall disclose to the AAA any circumstances likely to affect his or her impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such Arbitrator or other source, the AAA shall communicate such information to the parties, and, if it deems it appropriate to do so, to the Arbitrator. Thereafter, the AAA shall make a determination whether the Arbitrator should be disqualified. The determination, however, may be appealed to FMCS. The decision of FMCS shall be conclusive.

Sec. 12—Vacancies

If any Arbitrator should resign, die, withdraw, refuse, be disqualified, or be unable to perform the duties of his office, AAA may, on proof satisfactory to it, declare the office vacant. Either party to a compulsory arbitration may request the FMCS to review a declaration of disqualification. Vacancies shall be filled in accordance with the applicable provision of these Rules and the matter shall be reheard unless the parties shall agree otherwise.

Sec. 13—Commencement of Proceeding

(a) Within 60 days from receipt by the parties of notice of the appointment of an arbitrator, the claimant shall file with AAA:

(1) If appropriate, a detailed statement as to the amount of compensation claimed, the method of computing said amount, and terms of payment, and a list of the test data deemed to be compensable, together with a detailed justification therefore.

(2) A certification as to: (i) Whether any court or tribunal has made determinations for payment by any other persons to claimant for use of the same test data and, if so, identification of the persons against whom the 3(c)(2)(B) determinations were issued and the application for registration for which the test data was used; and (ii) whether any other claims against any persons are pending in arbitration or in any court for use of the same test data and, if so, an identification of the persons against whom the claims are pending and the applications for registration on which the claims are being made.

(3) A detailed statement of the matter in dispute under 3(c)(2)(B).

(b) Within 60 days of service of the documents referred to in subsection (a) the respondent shall file a detailed statement of its position as to the amount of compensation due, method of computation, terms of payment, and list of data deemed to be compensable together with a detailed justification therefore or a detailed statement of the dispute under 3(c)(2)(5). To the extent any portion of the claimant's statement of its claim is not denied or challenged by respondent, it shall be deemed admitted.

(c) After respondent's statement is filed, the arbitrator may, upon request by a party, request the Director to supplement the file with additional information, including copies of relevant test data, information contained in a relevant registration file, a statement as to data requirements for registration, or any other information which the arbitrator deems to be relevant. Upon request by a party or other interested person, the arbitrator shall order protective measures to safeguard and restrict access to confidential business information.

Sec. 14—Filing and Service

(a) All documents or papers required or authorized to be filed, shall be filed with the AAA for transmittal to the arbitrator, except as otherwise herein provided, and shall bear the caption of the case and the docket number. At the same time that a party files documents or papers with the AAA, the party shall serve upon all other parties copies thereof, with a certificate of service on or attached to each document or paper, including those filed with the arbitrator. If a party is represented by counsel or other representative, service shall be made on such representative. Service may be made personally or by regular mail, and if made by mail shall be deemed complete on mailing. If filing is accomplished by mail addressed to the AAA, filing shall be deemed timely if the papers are postmarked on the due date.

(b) All orders, decisions, or other documents made or signed by the arbitrator shall be served immediately upon all parties.

Sec. 15—Time

(a) In computing any period of time prescribed or allowed by these rules, except as otherwise provided, the day of the act, event, or default from which the designated period of time begins to run shall not be included. Saturdays, Sundays and legal holidays shall be included in computing the time allowed for the filing of any document or paper, except that when such time expires on a Saturday, Sunday, or legal holiday, such period shall be extended to include the next following business day.

(b) When by these rules or by order of the arbitrators, an act is required or allowed to be done at or within a specified time, the arbitrator or AAA for cause shown may at any time in their discretion (1) with or without motion or notice, order the period enlarged if request therefore, which may be made *ex parte*, is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) on motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect or other good cause.

Sec. 16—Communication with Arbitrator and Serving of Notices

(a) There shall be no communication between the parties and a neutral arbitrator other than at oral hearings. Any other oral or written communications from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

(b) Each party to an agreement which provides for arbitration under these Rules shall be deemed to have consented that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party by mail addressed to such party or his attorney at his last known address or by personal service, within or without the State wherein the arbitration is to be held (whether such party be within or without the United States of America): *Provided,* That reasonable opportunity to be heard with regard thereto has been granted such party.

Sec. 17—Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties, or specified by law, no later than thirty days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.

Sec. 18—Appearances

(a) Parties may appear in person or by counsel or other representative. Persons who appear as counsel or in a representative capacity must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

(b) Any party to the proceeding who, after being duly notified and without good cause being shown fails to appear at a prehearing conference or fails to respond to correspondence, shall be deemed to have waived his rights with respect thereto and shall be subject to such orders or determinations with respect thereto as the arbitrator shall make. The failure of a party to appear at a hearing shall constitute a waiver of the right to present evidence at such hearing. Where either party fails to appear at a hearing, the arbitrator shall require the presentation by the present party of such evidence as he deems necessary to prepare a decision in conformity with the requirements of the act.

(c) Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

Sec. 19—Consolidation and Severance

(a) The AAA may with agreement of all parties consolidate any matters at issue in two or more proceedings docketed under these Rules of Procedure where there exist common parties, common questions of fact and law, and where such consolidation would expedite or simplify consideration of the issues. Consolidation may also be effected where separate claims for use of the same test data are made against different respondents. The arbitrator who presides over the consolidated proceeding shall be chosen in accordance with section 3, *supra.*

(b) The arbitrator may, by motion or *sua sponte,* for good cause shown order any proceeding severed with respect to some or all parties or issues.

Sec. 20—Protection of Confidential Information

(a) The arbitrator shall make such orders as required to protect the secrecy of confidential information or documents such as review *in camera.*

(b) The arbitrator shall impose a sanction against any party who violates an order issued under this section. Such sanction may include an award against the offending party.

Sec. 21—Scheduling of Hearing

(a) After consideration of the convenience of the parties, the AAA shall serve upon the parties a notice of hearing setting a time and place for such hearing.

(b) Except for good cause shown, no request for postponement of a hearing will be granted. Such request must be received in writing at least a day in advance of the time set for the hearing. In case of postponement, the hearing shall be rescheduled for a date as early as circumstances will permit.

Sec. 22—Optional Accelerated Procedure

(a) In claims involving $25,000 or less, the parties may elect, prior to commencement of hearing, to have the claim processed under an expedited procedure. If no specific amount of claim is stated, a case will be considered to fall within this rule if the amount which the claimant represents in writing that it could recover as a result of any arbitrator's decision favorable to it does not exceed $25,000. Upon such election, a case shall then be processed under this rule unless the respondent objects and shows good cause why the substantive nature of the dispute requires processing under the regular procedures. In cases proceeding under this rule, the parties have waived discovery and briefs.

(b) The arbitrator shall schedule the dispute for hearing within thirty (30) days of service of notice to the parties that the dispute will be governed by this accelerated procedure, unless either party requests that the case be submitted without hearing under Section 19.

(c) Written decision by the arbitrators in cases proceeding under this rule normally will be short and contain summary findings of fact and conclusions only. The arbitrator shall render such decisions promptly, but in no event later than thirty days after the dispute is ready for decision.

Sec. 23—Discovery

(a) Either party may move for permission to serve written interrogatories and requests for production of documents upon the opposing party. The arbitrator shall grant such motion to the extent that such interrogatories and requests are designed to produce relevant evidence and only upon such terms as the arbitrator in his or her discretion considers to be consistent with the objective of securing a just and inexpensive determination of the dispute without unnecessary delay.

(b) Upon motion by either party, the arbitrator may order a deposition upon a showing of good cause and a finding that the deposition is designed to secure relevant and probative evidence which (1) cannot be obtained by alternative means, or (2) may otherwise not be preserved for presentation at hearing.

(c) If a party fails to comply with an order issued under this section, the arbitrator shall draw inferences adverse to that party in connection with the facts sought to be discovered.

(d) At least thirty days prior to the hearing, each party shall make available to each other party the names of the expert and other witnesses it intends to call, together with a detailed summary of their expected testimony, and copies of all documents and exhibits which the party intends to introduce into evidence. Thereafter, witnesses, documents, or exhibits may be added and narrative summaries of expected testimony amended only upon motion by a party for good cause shown.

Sec. 24—Prehearing Conference

(a) When it appears that such procedure will expedite the preceeding, the arbitrator at any time prior to the commencement of the hearing may request the parties and their counsel or other representative to appear at a conference before him or her to consider:

(i) The possibility of settlement of the case;

(ii) The simplification of issues and stipulation of facts not indispute;

(iii) The necessity or desirability of amending or supplementing documents in the record;

(iv) The possibility of obtaining admissions or stipulations of fact and of documents which will avoid unnecessary proof;

(v) The limitation of the number of expert or other witnesses;

(vi) The setting of a time and place for the hearing, giving consideration to the convenience of all parties and to the public interest; and

(vii) Any other matters as may expedite the disposition of the proceeding.

(b) No transcript of any prehearing conference shall be made unless ordered upon motion of a party or *sua sponte* by the arbitrator. In the absence of a transcript, the arbitrator shall prepare and file a report of the action taken at such conference. Such report shall incorporate any written stipulations or agreements made by the parties, all rulings upon matters considered at such conference, and appropriate orders containing directions to the parties. Such report shall, as appropriate, direct the subsequent course of the proceeding, unless modified by the arbitrators on motion or *sua sponte.*

Sec. 25—Evidence

(a) The arbitrator shall admit all evidence which is relevant, competent, material, not privileged, and not unduly repetitious. The weight to be given evidence shall be determined by its reliability and probative value.

(b) Except as otherwise provided in these Rules of Procedure or by the arbitrator, witnesses shall be examined orally, under oath or affirmation. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) Except where the arbitrator finds it impracticable, an original and two copies of each exhibit shall be filed at the time the exhibit is offered into evidence and a copy shall be furnished to each party. A true copy of an exhibit may be substituted for the original.

(d) Official notice may be taken of any matter judicially noticed in the Federal courts. The parties shall be given adequate opportunity to show that such facts are erroneously noticed.

Sec. 26—Order of Proceedings

(a) Hearing shall be opened by the filing of the oath of the arbitrator, and by the recording of the place, time and date of the hearing, the presence of the arbitrator, parties, and counsel.

(b) The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. The claimant shall then present his claim and proofs and his witnesses. The respondent shall then present his response and proofs and his witnesses. The arbitrator may in his descretion vary this procedure but he or she shall afford full and equal opportunity to all parties for the presentation of any material or relevant proofs.

Sec. 28—Burden of Presentation; Burden of Persuasion

The claimant shall have the burden of going forward to establish his entitlement to an amount of compensation that respondent should pay for use of the test data relied upon. Each matter of controversy shall be decided by the arbitrator upon a preponderance of the evidence.

Sec. 29—Stenographic Record

Any party may request a stenographic record by making arrangements for same through the AAA. If such transcript is agreed by the parties to be, or in appropriate cases determined by the arbitrator to be, the official record of the proceeding, it must be made available to the arbitrator, and to the other party for inspection, at a time and place determined by the arbitrator. The total cost of such a record shall be shared equally by those parties that order copies.

Sec. 30—Filing of Briefs, Proposed Findings of Fact and Conclusions of Law, and Proposed Order

Unless otherwise ordered by the arbitrator, each party may within thirty days after delivery of the transcript of a hearing to the arbitrator as provided in Section 29, file with AAA and serve upon all other parties a brief together with references to relevant exhibits and the record. Within Fifteen days thereafter each party may file a reply brief concerning matters contained in the opposing brief. Oral argument may be had at the discretion of the arbitrator.

Sec. 31—Closing of Hearings

The Arbitrator shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrator shall declare the hearings closed and the time and date shall be recorded. If briefs or other documents are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for filing with the AAA. The time limit within which the Arbitrator is required to make the award shall commence to run, in the absence of other agreement by the parties, upon the closing of the hearings.

Sec. 32—Arbitrators' Decision

(a) The arbitrator shall as soon as practicable after the filing of briefs evaluate the record and prepare and file a decision. The decision shall contain findings of fact and conclusions regarding all issues in dispute as well as reasons therefore.

(b) The decision shall contain a determination as to the compensation, if any respondent must pay to claimant, or other remedy as appropriate, the method of payment, and may fix such other terms and conditions as may be reasonable under the circumstances, including the furnishing of a bond or other guarantee of payment by the respondent to the claimant.

Sec. 33—Reopening of Hearings

(a) The hearings may be reopened by the arbitrator on his or her own motion, or upon application of a party at any time before the award is made. If the reopening of the hearings would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit. When no specific date is fixed, the arbitrator may reopen the hearings, and the arbitrator shall have thirty days from the closing of the reopened hearings within which to make an award.

(b) A motion to reopen a hearing to take further evidence, to rehear or reargue any matter related to such proceeding, or to reconsider the arbitrator's decision, must be made by motion in writing to the arbitrator in accordance with these Rules of Procedure. Every such motion must state the specific grounds upon which relief is sought.

(c) A motion to reopen a hearing for the purpose of taking further evidence may be filed at any time prior to the issuance of the arbitrator's decision. Such motion shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not cumulative, and shall set forth a good reason why such evidence was not adduced at a hearing.

(d) Motions to modify the arbitrator's decision shall be filed within 30 days after the date of service of the decision. Such motion must state specifically one of the following grounds for modification:

1. There was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

Sec. 34—Award Upon Settlement

If the parties settle their dispute during the course of the arbitration, the arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

Sec. 35—Delivery of Award to Parties

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at his last known address or to his attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

Sec. 36—Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to such party, at his or her expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

Sec. 37—Application to Court

(a) No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor FMCS is a necessary party in judicial proceedings relating to the arbitration.

(c) Parties to these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any Federal or State Court having jurisdiction thereof.

Sec. 38—Administrative Fees

As a nonprofit organization, the AAA shall prescribe an administrative fee schedule and a refund schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing or the time of refund shall be applicable.

The administrative fees shall be advanced by the initiating party or parties, subject to final appointment by the arbitrator in his award.

When a matter is withdrawn or settled, the refund shall be made in accordance with the refund schedule.

The AAA, in the event of extreme hardship on the part of any party, may defer or reduce the administrative fee.

Sec. 39—Fee When Oral Hearings Are Waived

Where all oral hearings are waived the Administrative Fee Schedule shall apply.

Sec. 40—Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses.

The cost of the stenographic record, if any is made, and all transcripts thereof, shall be prorated equally among all parties ordering copies unless they shall otherwise agree and shall be paid for by the responsible parties directly to the reporting agency.

All other expenses of the arbitration, including required traveling and other expenses of the arbitrator and of AAA representatives, and the expenses of any witness or the cost of any proofs produced at the direct request of the arbitrator, shall be borne equally by the parties.

Sec. 41—Arbitrator's Fee

Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly by him or her with the parties. Where parties cannot agree, AAA shall fix reasonable compensation.

Sec. 42—Deposits

The AAA may require the parties to deposit in advance such sums of money as it deems necessary to defray the expense of the arbitration, including the arbitrator's fee if any, and shall render an accounting to the parties and return any unexpened balance.

Sec. 43—Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules insofar as they relate to his or her powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by a majority vote. If that is unobtainable, either an arbitrator or a party may refer the question to the AAA for decision. All other Rules shall be interpreted and applied by the AAA. Either party may request that FMCS review any decision of AAA on interpretation or application of these rules.

ADMINISTRATIVE FEE SCHEDULE

The administrative fee of the AAA is based upon the amount of each claim and counterclaim as disclosed when the claim and counterclaim are filed, and is due and payable at the time of filing.

Amount of claim	Fee
Up to $25,000	$500.
$25,000 to $100,000	$600, plus 1% of excess over $25,000.
$100,000 to $200,000	$1350, plus ½% of excess over $100,000.
$200,000 to $5,000,000	$1850, plus ½% of excess over $200,000.

Where the claim or counter claim exceeds $5 million, an appropriate fee will be determined by the AAA.

When no amount can be stated at the time of filing, the administrative fee is $500, subject to adjustment in accordance with the above schedule as soon as an amount can be disclosed.

If there are more than two parties represented in the arbitration, an additional 10% of the initiating fee will be due for each additional represented party.

Other Service Charges—$50.00 payable by a party causing an adjournment of any scheduled hearing;

$100 payable by a party causing a second or additional adjournment of any scheduled hearing.

$25.00 payable by each party for each hearing after the first hearing which is either clerked by the AAA or held in a hearing room provided by the AAA.

Refund Schedule—If the AAA is notified that a case has been settled or withdrawn before a list of Arbitrators has been sent out, all the fees in excess of $500 will be refunded.

If the AAA is notified that a case has been settled or withdrawn thereafter but before the due date for the return of the first list, two-thirds of the fee in excess of $500.00 will be refunded.

If the AAA is notified that a case is settled or withdrawn thereafter but at least 48 hours before the date and time set for the first hearing, one-half of the fee in excess of $500 will be refunded.

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PART 1600—EMPLOYEE RESPONSIBILITIES AND CONDUCT

Subpart A—General Provisions

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APPENDIX A—INDEX TO SOME STATUTES AND EXECUTIVE ORDERS RELATED TO CONFLICT OF INTEREST AND OTHER PROHIBITED ACTIVITIES

AUTHORITY: E.O. 11222, 30 FR 6469, 3 CFR 1965 Supp.; 5 CFR 735.101 et seq.

SOURCE: 44 FR 47516, Aug. 13, 1979, unless otherwise noted.

Subpart A—General Provisions

§ 1600.735-101 Purpose and policy.

(a) *Purpose.* The purpose of this part is to implement appropriate requirements of law—Executive Order 11222, 3 CFR 1964 (May 8, 1965), and Part 735 of the Civil Service Commission Regulations adopted pursuant thereto (5 CFR Part 735), with respect to conduct and standards of behavior required of employees and former employees of the Equal Employment Opportunity Commission.

(b) *Policy.* All Government employees and special Government employees shall maintain high standards of ethical conduct to assure the proper performace of the Government's business and the citizens' confidence in and respect for their Government. The avoidance of misconduct and conflicts of interests, apparent or real, on the part of all employees, through their exercise of informed judgment, is indispensable to the maintenance of the standards in this part.

§ 1600.735-102 Definitions.

(a) "Chair" means the Chairman of the Equal Employment Opportunity Commission.

(b) "Commissioner" means a Commissioner of the Equal Employment Opportunity Commission.

(c) "Commission" means the Equal Employment Opportunity Commission.

(d) "Employee" means an officer or employee of the Equal Employment Opportunity Commission, but does not include a special Government employee.

(e) "Executive Order" means Executive Order 11222 of May 8, 1965.

(f) "Person" means an individual, government, labor union, corporation, company association, firm, partnership, society, joint stock company, or any other organization or institution as defined in 42 U.S.C. 2000e(a).

(g) "Special Government employee" means a temporary employee, with or without compensation, appointed to perform temporary duties for not to exceed 130 days during any period of 365 consecutive days on either a full-time or intermittent basis. Such employees are generally consultants or experts.

(h) "Teaching" means a series of instructions given at and under the auspices of an academic institution as part of its curriculum. Teaching is distinguished from lecturing or speechmaking in that lectures and speeches are not generally given under the auspices of an academic institution, are not normally given in series, and do not usually constitute part of the academic curriculum of the institution.

§ 1600.735-103 Applicability and scope.

(a) *Applicability.* This part applies to all employees of the Commission (including those in leave-without-pay status) but does not apply to special Government employees except to the extent stated in Subpart C of this part or as otherwise specified herein.

(b) *Scope.* This part prescribes standards of conduct for employees of the Commission relating to conflicts of interests arising out of outside employment, private business and professional activities, financial interests and participation in charitable and civic activities. It sets forth requirements for the disclosure of such financial interests by employees. In addition, it states basic principles regarding employees' conduct on the job and the ethics of their relationship to the Commission as their employer. This part, among other things, reflects prohibitions and requirements imposed by the criminal and civil laws of the United States. However, the paraphrased restatements of criminal and civil statutes in no way constitute an interpretation or construction thereof that is binding upon the Federal Government. Moreover, this part does not purport to paraphrase or enumerate all restrictions or requirements imposed by statutes, Executive Order, regulations or otherwise upon federal employees. The omission of a reference to any such restriction or requirement in no way alters the legal effect of that restriction or requirement.

§ 1600.735-104 Responsibilities.

(a) The Legal Counsel, has been designated the EEOC Ethics Official and Counselor to the Commission in matters within the scope of the regulations in this Part. The Legal Counsel shall:

(1) Serve as the Commission's designee to the Office of Personnel Management and the Merit Systems Protection Board on matters covered by the regulations in this part.

(2) Coordinate the Commission's counseling services and assure that counseling and interpretations on questions of conflict of interest and other matters covered by the regulations in this part are available as needed to deputy counselors.

(3) Render authoritative advice and guidance on matters covered by the regulations in this part which are presented by employees, special Government employees, the Director of Personnel Management Services or other management officials of the Commission's headquarters offices, or by deputy counselors.

(4) Receive information on and forward to the Chair for consideration, conflicts or appearance of conflicts which appear in the Statements of Employment and Financial Interests submitted under Subpart D of this part.

(b) District Office Directors are hereby designated Deputy Counselors for their respective field areas and the heads of offices are hereby designated Deputy Counselors for headquarters, except that the Deputy General Counsel shall perform all such duties for the Office of General Counsel, Headquarters. Deputy Counselors are responsible for advising employees on questions of ethics, conduct and conflicts of interests, in consultation with the Deputy General Counsel.

(c) All employees shall be responsible for acquainting themselves with and observing all generally accepted rules of conduct and the specific provisions of law and the regulations in this part. Employees who have doubts about any provision shall consult their supervisor.

(d) The Director of Personnel Management Services, shall be responsible for acquainting employees with these regulations within 90 days of their publication in the FEDERAL REGISTER and thereafter, new employees at the time of their entrance on duty. The Director of Personnel Management Services shall also be responsible for assuring employee's familiarity with any internal directives relating to these regulations.

(e) Personnel employed regularly and full-time in the immediate offices of Commissioners shall be subject to the standards of conduct and the procedural provisions set forth herein.

Each Commissioner shall be responsible for his or her own conduct and the conduct of the employees in his or her immediate office, and shall take whatever disciplinary action deemed appropriate in individual cases of misconduct by said employees. He or she may, if so desired, refer any cases arising among his or her immediate staff to the Chair to be administered in accordance with this order and any policies or procedures adopted pursuant thereto.

[44 FR 47516, Aug. 13, 1979, as amended at 47 FR 46275, Oct. 18, 1982]

§ 1600.735-105 Disciplinary and other remedial action.

An employee or special Government employee of the agency who violates any of the regulations in this part may be disciplined in accordance with any applicable laws, Executive Orders and regulations. The disciplinary action may be in addition to any penalty prescribed by law for the violation. In addition to or in lieu of disciplinary action, remedial action to end conflicts or appearance of conflicts of interest may include but is not limited to:

(a) Changes in assigned duties;

(b) Divestment by the employee or special Government employee of the conflicting interest; or

(c) Disqualification for a particular assignment.

§ 1600.735-106 Appeal.

Any employee or group of employees who disagree with the application of the provisions of this part to them have the right to request a review of their complaint through the appropriate grievance procedure.

Subpart B—Employee Responsibilities and Limitations on Employee Conduct

§ 1600.735-201 Proscriptions on conduct.

An employee shall avoid any action, whether or not specifically prohibited by this part, which might result in, or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government.

An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

§ 1600.735-202 Administrative approval.

Administrative approval is the authorization by the Chair (or such person or persons either designated by the Chair or identified in this part) for employees to engage in certain outside activities or to participate in their Government capacity in a matter in which they have a direct or indirect financial interest. In the case of the immediate staff of a Commissioner, such approval shall be obtained directly from the Commissioner. Administrative approval is required in advance for:

(a) Any outside employment for compensation as specified in § 1600.735-204(b);

(b) All outside legal work, as specified in § 1600.735-204(d);

(c) Certain professional and consultative services as described at § 1600.735-204(c), to the extent such services fall within the scope of § 1600.735-204(d);

(d) Certain writing, editing, publishing, teaching, lecturing and speechmaking activities as specified in § 1600.735-204 (b) and (e);

(e) Certain office-holding activities in professional societies as specified in § 1600.735-204(f);

(f) Participation of employees in their Government capacity in any matter in which they have a direct or indirect financial interest, on grounds that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government might expect, as specified in Subpart D of this part;

(g) Any other outside activity or financial interest for which the Chair imposes an internal requirement for administrative approval.

§ 1600.735-203 Accepting gifts and expenses from outside sources.

(a) *General limitations.* Employees shall not solicit or accept, directly or indirectly, any gifts, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with this agency;

(2) Conducts operations or activities that are regulated by this agency except as permitted by this part or by agency directive;

(3) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duty.

(b) *Exception.* The restrictions set forth in paragraph (a) of this section do not apply to:

(1) Obvious family or personal relationships such as those between employees and their parents, children, or spouse, when the circumstances make it clear that those relationships rather than the business of the persons concerned are the motivating factors.

(2) The acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where an employee may be properly in attendance.

(3) The acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans.

(4) The acceptance of unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars, and other items of nominal intrinsic value.

(5) The acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service or civic organization.

(6) Acceptance of reimbursement pursuant to 5 U.S.C. 4111(a), in cash or in kind, for travel, subsistence, and other expenses incident to official attendance at meetings. Such reimbursements can be made directly to the employee. An employee may accept reimbursement under this subsection only if:

(i) The Chair or his or her disignee, or in the case of the immediate staff of a Commissioner, the Commissioner, has authorized in advance the employee's official participation in the meeting as being in the interest of the Government and has determined that such participation is consistent with the conditions specified in 5 CFR 410.702(b);

(ii) Payment is to be made by an organization determined by the Secretary of the Treasury to be an organization described in 26 U.S.C. 501(c)(3) as exempt from taxation under section 501(a) of that title;

(iii) The employee is not reimbursed by the Government for any expenses for which outside reimbursement is received.

Notwithstanding any other provision of this part, employees may not be reimbursed, and payment may not be made on their behalf by outside sources for excessive personal living expenses, gifts, entertainment, or other personal benefits, or for travel on official business.

(c) *Gifts to superiors.* An employee shall not solicit contributions from another employee for a gift to an employee in a superior official position. An employee in a superior official position shall not accept a gift presented as a contribution from employees receiving less salary than himself or herself. An employee shall not make a donation as a gift to an employee in a superior official position (5 U.S.C. 7351). However, this does not prohibit a solicitation for or a voluntary gift of nominal value or donation in a nominal amount made on a special occasion, e.g., marriage, illness, or retirement.

(d) *Gifts from foreign governments.* An employee shall not accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided by the Constitution and in Pub. L. 89-673, 5 U.S.C. 7342.

§ 1600.735-204 Outside interests, employment, business and professional activities.

(a) *General limitations.* Employees shall not engage in outside activities, including employment, not compatible with the full and proper discharge of the duties and responsibilities of their Government employment whether or not in violation of any specific provision of a statute. Incompatible activities include, but are not limited to:

(1) Acceptance of a fee, compensation, honorarium, gift, payment of expense, or any other thing of monetary value in any circumstances in which acceptance may result in, or create the appearance of, a conflict of interest;

(2) Acceptance of a fee, compensation, honorarium, gift, or any other thing of monetary value for any activity or material produced thereby (with certain exceptions permitted below), the subject matter of which is devoted substantially to the responsibilities, programs or operations of the Commission, or which draws on official data or ideas which have not become part of the body of public information;

(3) Outside employment or activity which tends to impair mental or physical capacity to perform Government duties and responsibilities in an acceptable manner;

(4) Work which identifies the Commission or employees in their official capacity with any organization commercializing products relating to work conducted by the Commission or with any commercial advertising matter, or work performed under such circumstances as to give the impression that it is an official act of the Commission or represents an official point of view;

(5) Outside work or activity that takes an employee's time and attention during official work hours; and

(6) Employment or activity rendered to persons to whom the official duties of the employees are directly related, or indirectly related if the indirect relationship is significant enough to permit the existence of a conflict or an apparent conflict of interest.

(b) *Advance approval.* Employees must obtain advance written approval from their supervisor before undertaking outside employment for compensation or engaging in any outside activity or producing any material which is directly related to their position with the Commission or which is devoted substantially to the responsibilities, programs or operations of the Commission.

(c) *Professional and consultative services.* Employees may engage in outside professional or consultative services subject to the limitations of § 1600.735-204 (a) and (b). The term "consultative services" includes employees' membership on a Board of Directors or on any other body which provides professional advice, counsel, or consultation. Such work may not be rendered for compensation to help persons prepare or aid in the preparation of grant applications, contract proposals, program reports, affirmative action plans, complaints of discrimination, and/or other materials which are designed to become the subject of dealings between the person and the Federal Government.

(d) *Practice of law.* No employee of the Commission shall engage in the private practice of law including representation of parties at administrative hearings, except as authorized below and with the advance approval of his or her immediate supervisor and the Associate Legal Counsel, Legal Services. Specific exceptions to this subsection may be made for compelling reasons.

(1) An employee may, on off duty hours, engage in legal work for compensation which does not involve litigation, the work of this Commission, or any equal employment law. Permissible work could include, for example, real estate transactions, drafting of wills, and review of contracts.

(2) An employee may, on off duty hours, provide legal representation on a pro bono basis. Such representation may not include assisting in any matter in which the United States is a party or has a direct or substantial interest, unless the OPM and/or the Justice Department have approved such activity for Government employees, or in any matter or proceeding involving employment discrimination; however, nothing contained herein prevents an employee, if not inconsistent with the faithful performance of his duties, from acting without com-

pensation as agent or attorney for any person who is the subject of administrative proceedings.

(e) *Writing, editing, publishing, teaching, lecturing and speechmaking*—(1) *General.* Employees may engage in outside writing, editing, publishing, teaching, lecturing and speechmaking: *Provided,* That:

(i) Government-financed time, equipment, supplies or funds shall not be used by any employee in connection with such activity;

(ii) Official Commission support is not expressed or implied in the activity or in material produced therein;

(iii) Such activity is not dependent on specific information which has not previously been made public, unless the Chair of the Commission gives written authorization for use of nonpublic information on the basis that the use is in the public interest;

(iv) The activity is not for the purpose of the special preparation of a person or class of persons for an examination of the Office of Personnel Management or Board of Examiners for the Foreign Service, that depends on information obtained as a result of Government service, unless that information has been made available to the public, and

(v) The activity does not involve knowingly instructing persons on dealing with specific matters pending before the Commission or other Government organizations with which the employee is associated in an official capacity.

(2) *Additional restrictions applicable to outside lecturing and speechmaking.* No employee shall receive compensation or anything of monetary value for any lecturing, speechmaking or appearance the subject matter of which is devoted substantially to the responsibilities, programs or operations of the Commission. An employee is permitted to accept reimbursement in a reasonable amount to cover the expenses of travel and lodging in connection with such a lecture, speech or appearance. The provision in § 1600.735-204(b) concerning authorization to engage in certain outside activities for compensation with advance approval is not applicable to such outside lecturing and speechmaking.

(3) *Additional restrictions applicable to outside writing, editing and publishing.* (i) Disclaimers shall be used in all writing, editing and publishing related to the employee's official duties, the work of the Commission, or responsibilities and programs of the Federal Government. Disclaimers shall also be used whenever the employee is identified by official title or affiliation with the Commission or when the prominence of the employee, his or her position, or other reason might lead the public to make an association with the Commission, even without identification other than name.

(ii) Disclaimers shall read as follows unless a different wording is approved by the Legal Counsel: "This (article, book, etc.) was written (rewritten, edited, published) by (employee's name), in his/her private capacity. No official support or endorsement by the United States Equal Employment Opportunity Commission or any other agency of the United States Government is intended or should be inferred."

(f) *Holding office in professional societies and civic, charitable, religious, and social organizations.* Employees are encouraged to be members of professional societies and civic, charitable, religious and social organizations and be elected or appointed to office in such an organization, subject to the following restrictions:

(1) They must not directly or indirectly commit the Commission on any matter;

(2) They must not act as agent or attorney for a non-Government organization in dealing with the United States Government,

(3) They must not undertake any office or function beyond ordinary membership in an association, if to do so could create a real or apparent conflict of interest with their responsibilities as Commission employees; and

(4) They may not hold any elected or appointed position in an association whose activities are subject to the jurisdiction of the Commission, or whose activities are devoted substantially to the responsibilities, programs or operations of the Commission, without prior written approval from their su-

pervisors and the Associate Legal Counsel, Legal Services.

This restriction, however, does not preclude a Commission employee from holding an elected or appointed position in a professional society or organization merely because such society or organization merely because such society or organization is subject to the jurisdiction of the Commission.

[44 FR 47516, Aug. 13, 1979, as amended at 47 FR 46275, Oct. 18, 1982]

§ 1600.735-205 Financial interests.

(a) Employees shall not have a direct or indirect financial interest that conflicts substantially or appears to conflict substantially with their Government duties and responsibilities and may be required to divest themselves of such conflicting financial interests.

(b) Employees shall not participate in their Government capacity in any matter in which they, their minor children, their spouse, or an outside business associate or organization (profit or non-profit) with which they are connected or are negotiating employment has an interest, unless the outside financial interest is insubstantial and would not affect or appear to affect the integrity of the employee's official services. This determination should be made on a case by case basis by the employee's supervisor or if necessary, referred to the employee's deputy counselor.

(c) Employees shall not engage directly or indirectly in financial transactions as a result of, or primarily relying on information obtained through their employment.

§ 1600.735-206 Other standards of conduct.

(a) *Legislative relations.* An employee shall not, either directly or indirectly, use appropriated funds to influence a Member of Congress to favor or oppose legislation in violation of 18 U.S.C. 1913. However, an employee is not prohibited from:

(1) Testifying as a representative of the Commission on pending legislative proposals before Congressional committees on request or

(2) Assisting Congressional committees in drafting bills or reports on request, when it is clear that the employee is serving solely as a technical expert under the direction of committee leadership.

Nothing in this section precludes an employee from petitioning a Member of Congress while off duty with respect to any matters of personal concern, as long as no use of Government funds is involved.

(b) *Use of Government funds.* Several laws, referred to in Appendix A to this part, carry penalties for misuse of Government funds. These apply to:

(1) Improper use of official travel;

(2) Improper use of payroll and other vouchers and documents on which Government payments are based;

(3) Taking or failing to account for funds with which employees are entrusted in their official positions; and

(4) Taking other Government funds for personal use.

(c) *Use of Government property.* Employees shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. Employees have a positive duty to protect and conserve Government property, including equipment, supplies and other property entrusted or issued to them.

(d) *Conduct in Federal buildings.* (1) Employees shall not participate while on Government-owned or leased property or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket. However, this section does not preclude activities involving fund raising within the Federal service under section 3 of Executive Order 10927 and similar agency-approved activities.

(2) General Services Administration regulations on "Conduct on Federal Property" are applicable to all property under the control of the General Services Administration and are applied to all buildings and space under the control of this Commission. These regulations prohibit, among other things, gambling and consumption of intoxicating beverages on the prem-

ises. (See GSA Regulations at 41 CFR 101-20.300 *et seq.*)

(e) *Use of official information*—(1) *Classified information.* Employees who have access to information which is classified for security reasons in accordance with Executive Order 10501, as amended, are responsible for its custody and safekeeping, and for assuring that it is not disclosed to unauthorized persons.

(2) *Security and investigative information.* Security and investigative data received from Government agencies or other sources for official use only within the Commission or developed under a pledge of confidence is not to be divulged to unauthorized persons or agencies.

(f) *Fair treatment of employees.* Employees shall not be discriminated against in their employment because of race, color, religion, national origin, sex, age, politics, marital status, or on the basis of physical handicap with respect to any position the duties of which may be efficiently performed by a person with such a physical handicap.

(g) *Participation in management of employee organizations.* Employees shall not participate in the management of an employee organization as an officer of the organization or represent it in dealings with management when such activity might result in a conflict of interest or otherwise be incompatible with law or the official duties of the employee.

(h) *Political activity.* All employees in the Executive Branch of the Federal Government are subject to basic political activity restrictions. (See subchapter III of Chapter 73 of title 5, U.S.C. (the former Hatch Act) and Civil Service Rule IV.) Employees are individually responsible for refraining from prohibited political activity.

Subpart C—Conduct and Responsibilities of Special Government Employees

§ 1600.735-301 Standards.

Special Government employees shall be subject to the same standards of conduct and limitations prescribed in Subpart B of this part for other employees except:

(a) A special Government employee may accept compensation for an outside activity including a lecture or speech the subject matter of which is related to the responsibilities, programs or operations of the Commission as long as such outside activity does not draw on official data or ideas which have not become part of the body of public information.

(b) A special Government employee may engage in the private practice of law subject to the restrictions set forth in 18 U.S.C. 205.

Subpart D—Statement of Employment and Financial Interests

§ 1600.735-401 Employees required to submit statements.

(a) The following categories of employees are determined by the EEOC to be subject to the financial disclosure requirements of the Ethics in Government Act of 1978, (Pub. L. 95-521, Oct. 26, 1978) and are required to file the Financial Disclosure Report for Executive Branch Personnel

(1) Employees paid at a level of the Executive Scheduled in Subchapter II of Chapter 53 of Title 5, United States Code.

(2) Employees whose positions are classified at GS-16 or above of the General Schedule.

(3) All Schedule C employees except those who have been exempted from the disclosure requirements by the Office of Government Ethics.

(b) The following categories of employees are determined by the EEOC, subject to the right of appeal under § 1600.735-106, to be within the scope of 5 CFR Parts 735-403 and 735-404, and are therefore required to submit Statements of Employment and Financial Interests:

(1) All professional employees of the Office of Program Operations who have responsibilities for state and local programs.

(2) All professional employees in the Office of Management who have responsibilities for contracts and procurement.

(3) All professional employees in the Office of Audit.

(4) All District Directors and Deputy Directors regardless of their GS grade level, and who are not required to file the Financial Disclosure Report for Executive Branch Personnel.

(c) Each special Government employee shall submit a Statement of Employment and Financial Interest showing all other employment and such financial interests as the Commission determines are relevant in the light of the duties to be performed, except when this requirement is waived under 5 CFR 735.412(c).

[44 FR 47516, Aug. 13, 1979, as amended at 47 FR 46275, Oct. 18, 1982]

§ 1600.735-402 Time and place of submission of employee statement.

Financial disclosure reports shall be submitted by employees covered by § 1600.735-401 within 30 days of assuming office and annually on May 15 of each year thereafter. Special Government employees will complete forms at the time of entrance on duty. The completed original of these forms will be sent to the Director of Personnel Management Services, who will forward them to the Associate Legal Counsel, Legal Services for review. The Personnel Division shall retain files of the Financial Disclosure Reports after this review is completed.

[44 FR 47516, Aug. 13, 1979, as amended at 47 FR 46275, Oct. 18, 1982]

§ 1600.735-403 Review of statement of employment and financial interests.

The Associate Legal Counsel, Legal Services, shall review these statements for the purpose of disclosing any conflict of interest or apparent conflict of interest. When a question arises the reviewing officer shall consult with the employee to resolve the matter. If the indicated conflict cannot be resolved, the Legal Counsel should submit a written report with the recommendation for appropriate remedial action to the Chairman.

[47 FR 46275, Oct. 18, 1982]

§ 1600.735-404 Interest of employees' relatives.

The interest of a spouse and dependent child is considered to be an interest of the employee.

§ 1600.735-405 Information not known by employees.

If any information which is required to be included on a Financial Disclosure Report or supplementary statements, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information on his or her behalf.

§ 1600.735-406 Information not required.

This subpart does not require an employee to submit on a Statement of Employment and Financial Interests or supplementary statement any information relating to the employee's connection with, or interest in a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other entities which do research and development or related work involving grants of money from or contracts with the Government or organizations, including civil rights organizations, which have or might have matters pending before the Commission are deemed "business enterprises" and are required to be included in an employee's financial disclosure report.

APPENDIX A—INDEX TO SOME STATUTES AND EXECUTIVE ORDERS RELATED TO CONFLICT OF INTEREST AND OTHER PROHIBITED ACTIVITIES

Subject and Citation

A. Relating to Present Employees. (1) Ethics In Government Act of 1978 (Pub. L. 95-521, Oct. 26, 1978).

(2) Acceptance of gift of favor made with intent of influencing decision or action on any official matter (18 U.S.C. 201).

(3) Compensation from outside sources for services rendered in relation to any application, proceeding, contract, etc., in any matter in which the United States has a direct and substantial interest (18 U.S.C. 203).

(4) Acting as agent or attorney (1) for prosecution or aiding in prosecution of any claim against the United States, or (2) for anyone before any Department, agency, court, etc., in connection with a particular

matter in which the United States is a party or has a direct and substantial interest (18 U.S.C. 205).

(5) Participating personally and substantially as a Government employee in any application, request for a ruling, contract or other particular matter in which he, to his knowledge, or his spouse, minor child, or any organization with which he is negotiating, has a financial interest, direct or indirect (18 U.S.C. 208).

(6) Receipt of any salary or contribution to or supplementation of salary as compensation for services as a Government employee from any source other than the Government (18 U.S.C. 209).

(7) Use of appropriated funds, services, or communications with intent to influence any member of Congress to favor or oppose any legislation or appropriation (18 U.S.C. 1913).

(8) Participation in strike against Government (5 U.S.C. 1918).

(9) Advocating the overthrow of the constitutional form of Government in the United States or being a member of an organization that so advocates (5 U.S.C. 7311).

(10) Disclosing confidential information or classified information (18 U.S.C. 798, 50 U.S.C. 783, 18 U.S.C. 1905).

(11) Habitual use of intoxicants to excess (5 U.S.C. 7352).

(12) Using or authorizing the use of Government automobiles for other than official purposes (31 U.S.C., 638a(c)).

(13) Using official envelopes or labels to avoid payment of postage (18 U.S.C. 1719).

(14) Deceiving in an examination or personnel action in connection with Government employment (18 U.S.C. 1917)

(15) Practicing fraud or making false statements in a Government matter (18 U.S.C. 1001).

(16) Mutilating or destroying a public record (18 U.S.C. 2071).

(17) Falsely making, forging, or attempting to pass a forged or altered travel request (18 U.S.C. 508).

(18) Taking for own use or use of another any government record, voucher, money, or thing of value (18 U.S.C. 641).

(19) Failure to account for public money received (18 U.S.C. 643).

(20) Embezzling money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(21) Taking or attempting to use vouchers or documents intended to be used to procure payments by the United States (18 U.S.C. 285).

(22) Prohibition against certain political activities (subchapter III of Chapter 73) of title 5 U.S.C. (the former Hatch Act), 18 U.S.C. 602, 603 and 607, and 2 U.S.C. 441a.

(23) Making or soliciting gifts for official superiors, or accepting gifts from employees receiving a lower salary (5 U.S.C. 7351).

(24) Conviction for participating in or organizing or inciting a riot or civil disorder (5 U.S.C. 7313).

(25) Non-discrimination in Government employment (42 U.S.C. 2000e-16 and E.O. 11246).

(26) Acting as an agent of a foreign principal registered under the foreign Agent Registeration Act (18 U.S.C. 219).

(27) Making public charges filed with the Commission (42 U.S.C. 2000e-5(b)).

(28) Making public information obtained by the Commission pursuant to 42 U.S.C. 2000e-8 prior to the commencement of a proceeding (42 U.S.C. 2000e-8(e)).

(29) Accepting: (a) An honorarium of more than $2,000 for any speech, article, or appearance.

(b) Honorariums aggregating more than $25,000 in any calendar year (2 U.S.C. 441i).

(30) Knowing acts of self-dealing with private foundations, which can include even the acceptance of reimbursement for travel (26 U.S.C. 4941).

B. Relating to Former Employees. (1) At any time after employment has ceased, acting as agent or attorney for anyone other than the Government in connection with any application, contract, claim, proceeding or other matter against the United States, involving a specific party, in any matter in which the United States has an interest, and in which the employee had participated personally and substantially when with the Government (18 U.S.C. 207).

(2) Within two years after employment has ceased, appearing personally before any agency in connection with any application, contract, claim, proceeding, or other matter against the United States, involving a specific party, which was under the employee's official responsibility when with the Government (18 U.S.C. 207).

(3) For one year after employment has ceased, a former Senior Employee may not represent another person or himself in attempting to influence his or her former agency on a matter pending before, or of substantial interest to, such agency or, with the intent to influence, make any oral or written communication on behalf of another person or himself to his or her former agency (18 U.S.C. 207).

PART 1601—PROCEDURAL REGULATIONS

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AUTHORITY: Sec. 713(a), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(a), unless otherwise noted.

SOURCE: 42 FR 55388, Oct. 14, 1977, unless otherwise noted.

§ 1601.1 Purpose.

The regulations set forth in this part 1601 contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of Title VII of the Civil Rights Act of 1964, as amended. Based upon its experience in the administration of the Act and upon its evaluation of suggestions and petitions for amendments submitted by interested persons in accordance with § 1601.35, the Commission may from time to time amend and revise these procedures.

Subpart A—Definitions

§ 1601.2 Terms defined in Title VII of the Civil Rights Act of 1964, as amended.

The terms "person," "employer," "employment agency," "labor organization," "employee," "commerce," "industry affecting commerce," "State" and "religion" as used herein shall have the meanings set forth in section 701 of Title VII of the Civil Rights Act of 1964, as amended.

[44 FR 4668, Jan. 23, 1979]

§ 1601.3 Other definitions.

(a) For the purposes of this part, the term "Title VII" or "the Act" shall mean Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972; the term "Commission" shall mean the Equal Employment Opportunity Commission or any of its designated representatives; the term "706 Agency" shall mean a State or local agency which the Commission has determined satisfies the criteria stated in section 706(c) of Title VII; and the term "verified" shall mean sworn to or affirmed before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths and take acknowledgements, or supported by an unsworn declaration in writing under penalty of perjury.

(b) The delegations of authority in Subpart B of this part are applicable to charges filed pursuant to either section 706 or section 707 of Title VII.

§ 1601.4 Vice Chairman's functions.

The member of the Commission designated by the President to serve as Vice Chairman shall act as Chairman in the absence or disability of the Chairman or in the event of a vacancy in that office.

§ 1601.5 District; area; supervisory authority.

The term "district" as used herein shall mean that part of the United States or any territory thereof fixed by the Commission as a particular district. The term "district director" shall refer to that person designated as the Commission's chief officer in each district. The term "area" shall mean that part of the United States within a district fixed by the Commission as a particular sub-unit of a district. The term "area director" shall refer to that person designated as the Commission's chief officer in each area. The term "local office" shall mean an EEOC office with responsibility over a part of the United States within a district fixed by the Commission as a particular sub-unit of a district. The term "local director" shall refer to that person designated as the Commission's chief officer for the local office. Each district office will operate under the supervision of the Program Director, Office of Program Operations through the Directors, Regional Programs, Office of Program Operations, and the General Counsel. Each area and local office will operate under the supervision of the district director. Any or all delegations, or actions taken, as provided by this Part may be revoked and/or exercised by the supervisor in keeping with the supervisory structure described in this section.

[44 FR 4668, Jan. 23, 1979, as amended at 47 FR 46275, Oct. 18, 1982; 49 FR 13024, Apr. 2, 1984]

Subpart B—Procedure for the Prevention of Unlawful Employment Practices

§ 1601.6 Submission of information.

The Commission shall receive information concerning alleged violations of Title VII from any person. Where the information discloses that a person is entitled to file a charge with the Commission, the appropriate office shall render assistance in the filing of a charge. Any person or organization may request the issuance of a Commissioner charge for an inquiry into individual or systematic discrimination. Such request, with any pertinent information, should be submitted to the nearest District Office.

§ 1601.7 Charges by or on behalf of persons claiming to be aggrieved.

(a) A charge that any person has engaged in or is engaging in an unlawful employment practice within the meaning of Title VII may be made by or on behalf of any person claiming to be aggrieved. A charge on behalf of a person claiming to be aggrieved may be made by any person, agency, or organization. The written charge need not identify by name the person on whose behalf it is made. The person making the charge, however, must provide the Commission with the name, address and telephone number of the person on whose behalf the charge is made. During the Commission investigation, Commission personnel shall verify the authorization of such charge by the person on whose behalf the charge is made. Any such person may request that the Commission shall keep his or her identity confidential. However, such request for confidentiality shall not prevent the Commission from disclosing the identity to Federal, State or local agencies that have agreed to keep such information confidential. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests for such information.

(b) The person claiming to be aggrieved has the responsibility to provide the Commission with notice of any change in address and with notice of any prolonged absence from that current address so that he or she can be located when necessary during the Commission's consideration of the charge.

§ 1601.8 Where to make a charge.

A charge may be made in person or by mail at the offices of the Commission in Washington, D.C., or any of its district, area or local offices or with any designated representative of the Commission. The addresses of the Commission's field offices appear in § 1610.4.

[44 FR 4668, Jan. 23, 1979, as amended at 49 FR 13024, Apr. 2, 1984]

§ 1601.9 Form of charge.

A charge shall be in writing and signed and shall be verified.

§ 1601.10 Withdrawal of a charge by a person claiming to be aggrieved.

A charge filed by or on behalf of a person claiming to be aggrieved may be withdrawn only by the person claiming to be aggrieved and only with the consent of the Commission. The Commission hereby delegates authority to District Directors, Area Directors, Local Directors, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Regional Programs, Office of Program Operations, or their designees, to grant consent to a request to withdraw a charge, other than a Commissioner charge, where the withdrawal of the charge will not defeat the purposes of Title VII.

[44 FR 4669, Jan. 23, 1979, as amended at 47 FR 46275, Oct. 18, 1982; 49 FR 13024, Apr. 2, 1984]

§ 1601.11 Charges by members of the Commission.

(a) Any member of the Commission may file a charge with the Commission. Such charge shall be in writing and signed and shall be verified.

(b) A Commissioner who files a charge under paragraph (a) of this section may withdraw the charge with the consent of the Commission. The Commission may withdraw any charge filed under paragraph (a) of this section by a Commissioner who is no longer holding office when it determines that the purposes of title VII are no longer served by processing the charge. Commissioner charges may not be withdrawn pursuant to this section after a determination as to reasonable cause has been made. This paragraph does not apply to a charge filed by a Commissioner which is on behalf of a person claiming to be aggrieved within the meaning of § 1601.7 unless such person submits a written request for withdrawal to the Commission.

[43 FR 30798, July 18, 1978]

§ 1601.12 Contents of charge; amendment of charge.

(a) Each charge should contain the following: (1) The full name, address and telephone number of the person making the charge except as provided in § 1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See § 1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

§ 1601.13 Filing; deferrals to State and local agencies.

(a) *Initial presentation of a charge to the Commission.* (1) Charges arising in jurisdictions having no 706 Agency are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(2) A jurisdiction having a 706 Agency without subject matter jurisdiction over a charge (e.g., an agency which does not cover sex discrimination or does not cover nonprofit organizations) is equivalent to a jurisdiction having no 706 Agency. Charges over which a 706 Agency has no subject matter jurisdiction are filed with the Commission upon receipt and are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(3) Charges arising in jurisdictions having a 706 Agency but which charges are apparently untimely under the applicable state or local statute of limitations are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 300 days from the date of the alleged violation. Copies of all such charges will be forwarded to the appropriate 706 Agency.

(4) Charges arising in jurisdictions having a 706 Agency and which charges are apparently timely under the applicable state or local statute of limitations, are to be processed in accordance with the Commission's deferral policy set forth below and the procedures in paragraph (a)(5) of this section.

(i) In order to give full weight to the policy of section 706(c) of the Act, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by Title VII and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to State and local agencies as is permitted by law and as is practicable.

(ii) Section 706(c) of Title VII grants States and their political subdivisions the exclusive right to process allegations of discrimination filed by a person other than a Commissioner for a period of 60 days (or 120 days during the first year after the effective date of the qualifying State or local law). This right exists where, as set forth in § 1601.70, a State or local law prohibits the employment practice alleged to be unlawful and a State or local agency has been authorized to grant or seek relief. After the expiration of the exclusive processing period, the Commission may commence processing the allegation of discrimination.

(iii) A 706 Agency may waive its right to the period of exclusive processing of charges provided under section 706(c) of Title VII with respect to any charge or category of charges. Copies of all such charges will be forwarded to the appropriate 706 Agency.

(5) The following procedures shall be followed with respect to charges which arise within the jurisdiction of a 706 Agency and which are apparently timely under the applicable state or local statute of limitations:

(i) Where any document, whether or not verified, is received by the Commission as provided in § 1601.8 which may constitute a charge cognizable under Title VII, and where the 706 Agency has not waived its right to the period of exclusive processing with respect to that document, that document shall be deferred to the appropriate 706 Agency as provided in the procedures set forth below:

(A) All such documents shall be dated and time stamped upon receipt.

(B) A copy of the originial document, shall be transmitted by registered mail, return receipt requested, to the appropriate 706 Agency, or, where the 706 Agency has consented thereto, by certified mail, by regular mail or by hand delivery. State or local proceedings are deemed to have commenced on the date such document is mailed or hand delivered.

(C) The person claiming to be aggrieved and any person filing a charge on behalf of such person shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the 706 Agency pursuant to the provisions of section 706(c).

(ii) Charges which arise within the jurisdiction of a 706 Agency and which are apparently timely under the applicable state or local statute of limitations are deemed to be filed with the Commission as follows:

(A) Where the document on its face constitutes a charge within a category of charges over which the 706 Agency has waived its rights to the period of exclusive processing referred to in paragraph (a)(4)(iii) of this section, the charge is deemed to be filed with the Commission upon receipt of the document. Such filing is timely if the charge is received within 300 days from the date of the alleged violation.

(B) Where the document on its face constitutes a charge which is not within a category of charges over which the 706 Agency has waived its right to the period of exclusive processing referred to in paragraph (a)(4)(iii) of this section, the Commission shall process the document in accordance with paragraph (a)(5)(i) of this section. The charge shall be deemed to be filing with the Commission upon expiration of 60 (or where appropriate, 120) days after deferral, or upon the termination of 706 Agency proceedings, or upon waiver of the 706 Agency's right to exclusively process the charge, whichever is earliest. Where the 706 Agency earlier terminates its proceedings or waives its right to exclusive processing of a charge, the charge shall be deemed to be filed with the Commission on the date the 706 Agency terminated its proceedings or the 706 Agency waived its right to exclusive processing of the charge. Such filing is timely if effected within 300 days from the date of the alleged violation.

(b) *Initial presentation of a charge to a 706 Agency.* (1) When a charge is initially presented to a 706 Agency and the charging party requests that the charge be presented to the Commission, the charge will be deemed to be filed with the Commission upon expiration of 60 (or where appropriate, 120) days after a written and signed statement of facts upon which the charge is based was sent to the 706 Agency by registered mail or was otherwise received by the 706 Agency, or upon the termination of 706 Agency proceedings, or upon waiver of the 706 Agency's right to exclusively process the charge, whichever is earliest. Such filing is timely if effected within 300 days from the date of the alleged violation.

(2) When a charge is initially presented to a 706 Agency but the charging party does not request that the charge be presented to the Commission, the charging party may present

the charge to the Commission as follows:

(i) If the 706 Agency has refused to accept a charge, a subsequent submission of the charge to the Commission will be processed as if it were an initial presentation in accordance with paragraph (a) of this section.

(ii) If the 706 Agency proceedings have terminated, the charge may be timely filed with the Commission within 30 days of receipt of notice that the 706 Agency proceedings have been terminated or within 300 days from the date of the alleged violation, whichever is earlier.

(iii) If the 706 Agency proceedings have not been terminated, the charge may be presented to the Commission within 300 days from the date of the alleged violation. Once presented, such a charge will be deemed to be filed with the Commission upon expiration of 60 (or where appropriate, 120) days after a written and signed statement of facts upon which the charge is based was sent to the 706 Agency by certified mail or was otherwise received by the 706 Agency, or upon the termination of the 706 Agency proceedings, or upon waiver of the 706 Agency's right to exclusively process the charge, whichever is earliest. To be timely, however, such filing must be effected within 300 days from the date of the alleged violation.

(c) *Agreements With Fair Employment Practice Agencies.* Pursuant to section 705(g)(1) and section 706(b) of Title VII, the Commission shall endeavor to enter into agreements with 706 Agencies and other fair employment practice agencies to establish effective and integrated resolution procedures. Such agreements may include, but need not be limited to, cooperative arrangements to provide for processing of certain charges by the Commission, rather than by the 706 Agency during the period specified in section 706(c) and section 706(d) of Title VII.

(d) *Preliminary relief.* When a charge is filed with the Commission, the Commission may make a preliminary investigation and commence judicial action for immediate, temporary or preliminary relief pursuant to section 706(f)(2) of Title VII.

(e) *Commissioner charges.* A charge made by a member of the Commission shall be deemed filed upon receipt by the Commission office responsible for investigating the charge. The Commission will notify a 706 Agency when an allegation of discrimination is made by a member of the Commission concerning an employment practice occurring within the jurisdiction of the 706 Agency. The 706 Agency will be entitled to process the charge exclusively for a period of not less than 60 days if the 706 Agency makes a written request to the Commission within 10 days of receiving notice that the allegation has been filed. The 60-day period shall be extended to 120 days during the first year after the effective date of the qualifying State or local law.

[46 FR 43039, Aug. 26, 1981, as amended at 46 FR 48189, Oct. 1, 1981]

§ 1601.14 Service of charge or notice of charge.

(a) Within ten days after the filing of a charge in the appropriate Commission office, the Commission shall serve respondent a copy of the charge, by mail or in person, except when it is determined that providing a copy of the charge would impede the law enforcement functions of the Commission. Where a copy of the charge is not provided, the respondent will be served with a notice of the charge within ten days after the filing of the charge. The notice shall include the date, place and circumstances of the alleged unlawful employment practice. Where appropriate, the notice may include the identity of the person or organization filing the charge.

(b) The District Directors, the Area Directors, Local Directors, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Regional Programs, Office of Program Operations, or their designees, are hereby delegated the authority to issue the notice described in paragraph (a) of this section.

[44 FR 4669, Jan. 23, 1979, as amended at 47 FR 46275, Oct. 18, 1982; 49 FR 13024, Apr. 2, 1984; 49 FR 13874, Apr. 9, 1984]

INVESTIGATION OF A CHARGE

§ 1601.15 Investigative authority.

(a) The investigation of a charge shall be made by the Commission, its investigators, or any other representative designated by the Commission. During the course of such investigation, the Commission may utilize the services of State and local agencies which are charged with the administration of fair employment practice laws or appropriate Federal agencies, and may utilize the information gathered by such authorities or agencies. As part of each investigation, the Commission will accept any statement of position or evidence with respect to the allegations of the charge which the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, or the respondent wishes to submit.

(b) As part of the Commission's investigation, the Commission may require the person claiming to be aggrieved to provide a statement which includes:

(1) A statement of each specific harm that the person has suffered and the date on which each harm occurred;

(2) For each harm, a statement specifying the act, policy or practice which is alleged to be unlawful;

(3) For each act, policy, or practice alleged to have harmed the person claiming to be aggrieved, a statement of the facts which lead the person claiming to be aggrieved to believe that the act, policy or practice is discriminatory.

(c) The Commission may require a fact-finding conference with the parties prior to a determination on a charge of discrimination. The conference is primarily an investigative forum intended to define the issues, to determine which elements are undisputed, to resolve those issues that can be resolved and to ascertain whether there is a basis for negotiated settlement of the charge.

(d) The Commission's authority to investigate a charge is not limited to the procedures outlined in paragraphs (a), (b), and (c) of this section.

§ 1601.16 Access to and production of evidence; testimony of witnesses; procedure and authority.

(a) To effectuate the purposes of Title VII, any member of the Commission shall have the authority to sign and issue a subpoena requiring:

(1) the attendance and testimony of witnesses;

(2) the production of evidence including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpoenaed; and

(3) access to evidence for the purposes of examination and the right to copy.

Any District Director, the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Regional Programs, Office of Program Operations, or any representatives designated by the Commission may sign and issue a subpoena on behalf of the Commission. The subpoena shall state the name and address of its issuer, identify the person or evidence subpoenaed, the person to whom and the place, date, and the time at which it is returnable or the nature of the evidence to be examined or copied, and the date and time when access is requested. A subpoena shall be returnable to a duly authorized investigator or other representative of the Commission. Neither the person claiming to be aggrieved, the person filing a charge on behalf of such person nor the respondent shall have the right to demand that a subpoena be issued.

(b) Any person served with a subpoena who intends not to comply therewith shall within five days (excluding Saturdays, Sundays and Federal legal holidays) after the date of service of the subpoena upon him or her, petition the General Counsel by mail to revoke or modify the subpoena. Such petition shall be mailed to 2401 E Street NW., Washington, D.C. 20506, and a copy thereof shall be served on the person who issued the subpoena. The petition shall separately identify each portion of the subpoena with which the petitioner does not intend to comply and shall state, with respect to each such portion, the grounds upon which the petitioner relies. A copy of the subpoena shall be attached to the petition and shall be designated "Attachment A." Within 8 days after receipt thereof or as soon thereafter as practicable, the General Counsel shall make a determination upon the petition, stating reasons, and shall submit the petition and determination to the Commission for its review. The Commission shall review the petition and make a final determination. A commissioner who has issued a subpoena shall abstain from reviewing any petition to modify or revoke the subpoena. The Commission shall serve a copy of the final determination of the petition upon the petitioner. For purposes of this section, service shall be made and proof thereof established pursuant to section 11(4) of the National Labor Relations Act, as amended, 29 U.S.C. 161(4), as made applicable to Commission hearings and investigations by section 710 of Title VII: *Provided, however,* That, whenever the subpoena was issued by the District Director, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Regional Programs, Office of Program Operations, the petition to revoke or modify the subpoena shall be mailed to the Director, within the 5-day period specified above, who will make a determination on the petition. Any petitioner who wishes to appeal the determination of the Director shall do so by following the standard procedures specified above. Such appeal shall, in addition, be clearly labeled as "Appeal of Petition to Revoke or Modify Subpoena," and shall attach the initial petition and determination, designated as "Attachments B and C." No argument not presented to the District Director, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Regional Programs, Office of Program Operations will be considered by the Commission.

(c) Upon the failure of any person to comply with a subpoena issued under this section, the Commission may utilize the procedures of section 11(2) of the National Labor Relations Act, as amended, 29 U.S.C. 161(2), to compel enforcement of the subpoena.

(d) Witnesses who are subpoenaed pursuant to § 1601.16(a) shall be entitled to the same fees and mileage that are paid witnesses in the courts of the United States.

[43 FR 30798, July 18, 1978, as amended at 44 FR 4669, Jan. 23, 1979; 47 FR 46275, Oct. 18, 1982]

§ 1601.17 Witnesses for public hearings.

(a) To effectuate the purposes of Title VII, any Commissioner, upon approval of the Commission, may demand in writing that a person appear at a stated time and place within the State in which such person resides, transacts business, or is served with the demand, for the purpose of testifying under oath before the Commission or its representative. If there be noncompliance with any such demand, the Commission may utilize the procedures of section 710 of Title VII to compel such person to testify. A transcript of testimony may be made a part of the record of each investigation.

(b) Witnesses who testify as provided in paragraph (a) of this section shall be entitled to the same fees and mileage that are paid witnesses in the courts of the United States.

§ 1601.18 Right to inspect or copy data.

A person who submits data or evidence to the Commission may retain or, on payment of lawfully prescribed costs, procure a copy of transcript thereof, except that a witness may for good cause be limited to inspection of the official transcript of his or her testimony.

PROCEDURE FOLLOWING FILING OF A CHARGE

§ 1601.19 Dismissal: Procedure and authority.

(a) Where a charge on its face, or as amplified by the statements of the person claiming to be aggrieved discloses, or where after investigation the Commission determines, that the charge and every portion thereof is not timely filed, or otherwise fails to state a claim under Title VII, the Commission shall dismiss the charge. A charge which raises a claim exclusively under section 717 of Title VII shall not be taken and persons seeking to raise such claims shall be referred to the appropriate Federal agency.

(b) Where the Commission determines after investigation that there is not reasonable cause to believe that Title VII has been violated, the Commission shall dismiss the charge.

(c) Where the person claiming to be aggrieved fails to provide requested necessary information, fails or refuses to appear or to be available for interviews or conferences as necessary, fails or refuses to provide information requested by the Commission pursuant to § 1601.15(b), or otherwise refuses to cooperate to the extent that the Commission is unable to resolve the charge, and after due notice, the charging party has had 30 days in which to respond, the Commission may dismiss the charge.

(d) Where the person claiming to be aggrieved cannot be located, the Commission may dismiss the charge: *Provided*, That reasonable efforts have been made to locate the charging party and the charging party has not responded within 30 days to a notice sent by the Commission to the person's last known address.

(e) Where a respondent has made a settlement offer described in § 1601.20 which is in writing and specific in its terms, the Commission may dismiss the charge if the person claiming to be aggrieved refuses to accept the offer: *Provided*, That the offer would afford full relief for the harm alleged by the person claiming to be aggrieved and the person claiming to be aggrieved fails to accept such an offer within 30 days after actual notice of the offer.

(f) Written notice of disposition, pursuant to paragraphs (a), (b), (c), (d), or (e) of this section, shall be issued to the person claiming to be aggrieved and to the person making the charge on behalf of such person, where applicable; in the case of a Commissioner charge, to all persons specified in § 1601.28(b)(2); and to the respondent. Appropriate notices of right to sue shall be issued pursuant to § 1601.28.

(g) The Commission hereby delegates authority to District Directors; the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Regional Programs, Office of Program Operations, as appropriate, to dismiss charges, as limited by § 1601.21(d). The Commission hereby delegates authority to Area Directors or Local Directors to dismiss charges pursuant to paragraphs (a), (c) and (d) of this section, as limited by § 1601.21(d). District Directors may redelegate authority to Area Directors or Local Directors to dismiss charges pursuant to paragraph (b) of this section, as limited by § 1601.21(d). The authority of the Commission to reconsider decisions and determinations as set forth in § 1601.21 (b) and (d) shall be applicable to this section.

[42 FR 55388, Oct. 14, 1977, as amended at 48 FR 19165, Apr. 28, 1983; 49 FR 13024, Apr. 2, 1984]

§ 1601.20 Negotiated settlement.

(a) Prior to the issuance of a determination as to reasonable cause the Commission may encourage the parties to settle the charge on terms that are mutually agreeable. District Directors, Area Directors, Local Directors, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Regional Programs, Office of Program Operations, or their designees, shall have the authority to sign any settlement agreement which is agreeable to both parties. When the Commission agrees in any negotiated settlement not to process that charge further, the Commission's agreement shall be in consideration for the promises made by theother parties to the agreement. Such an agreement shall not affect the processing of any other charge, including, but not limited to, a Commissioner charge or a charge, the allegations of which are like or related to the individual allegations settled.

(b) In the alternative, the Commission may facilitate a settlement between the person claiming to be aggrieved and the respondent by permitting withdrawal of the charge pursuant to § 1601.10.

[44 FR 4669, Jan. 23, 1979, as amended at 47 FR 46275, Oct. 18, 1982; 49 FR 13024, Apr. 2, 1984; 49 FR 13874, Apr. 9, 1984]

§ 1601.21 Reasonable cause determination: Procedure and authority.

(a) Where a charge has not been settled or dismissed, the Commission shall, after making investigative efforts, determine whether reasonable cause exists to believe that Title VII has been violated. A determination as to reasonable cause is based on, and limited to, evidence obtained by the Commission and does not reflect any judgment on the merits of allegations not addressed in the determination.

(b) The Commission shall provide prompt notification of its determination under paragraph (a) of this section to the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, and the respondent, or in the case of a Commissioner charge, the person named in the charge or identified by the Commission in the third party certificate, if any, and the respondent. The Commission may, however, on its own initiative reconsider its decision or the determination of any of its designated officers who have authority to issue Letters of Determination, *EXCEPT that the Commission will not reconsider determinations of reasonable cause previously issued against a government, governmental entity or political subdivision after a failure of conciliation as set forth in § 1601.25.*

(1) In cases where the Commission decides to reconsider a dismissal or a determination finding reasonable cause to believe a charge is true, a notice of intent to reconsider will promptly issue. If such notice of intent to reconsider is issued within 90 days from receipt of a notice of right to sue and the charging party has not filed suit and did not receive a notice of right to sue pursuant to § 1601.28(a)(1) or (2), the notice of intent to reconsider will vacate the dismissal or letter of determination and revoke the notice of right to sue. If the 90 day period has expired, the charging party has filed suit, or the charging party had requested a notice of right to sue pursuant to § 1601.28(a)(1) or (2), the notice of intent to reconsider will vacate the dismissal or letter of determination, but will not revoke the notice of right to sue. After reconsideration the Commission will issue a determination anew. In those circumstances where the notice of right to sue has been revoked, the Commision will, in accordance with § 1601.28, issue a notice of right to sue anew which will provide the charging party with 90 days within which to bring suit.

(2) The Commission shall provide prompt notification of its intent to reconsider, which is effective upon issuance, and its final decision after reconsideration to the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, and the respondent, or in the case of a Commissioner charge, the person named in the charge or identified by the Commissioner in the third-party certificate, if any, and the respondent.

(c) Where a member of the Commission has filed a Commissioner charge, he or she shall abstain from making a determination in that case.

(d) The Commission hereby delegates to District Directors or upon delegation, Area Directors, or Local Directors, the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Regional Programs, Office of Program Operations the authority, in those cases in which previously issued Commission Decisions serve as precedent for the determination and in those cases in which the Commission's Guidelines provide a statement of policy which serves as authority for the determination, upon completion of an investigation, to dismiss a charge, make a determination, issue a Letter of Determination and serve a copy thereof upon the parties. Each determination is final when the Letter of Determination is issued. However, the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Regional Programs, Office of Program Operations; each District Director; each Area Director and each Local Director, for determinations issued by his or her office, may on his or her own initiative reconsider determinations, *Except that such directors may not reconsider determinations of reasonable cause previously issued against a government, governmental entity or political subdivision after a failure of conciliation as set forth in § 1601.25.*

(1) In cases where the issuing Director decides to reconsider a dismissal or a determination finding reasonable cause to believe a charge is true, a notice of intent to reconsider will promptly issue. If such notice of intent to reconsider is issued within 90 days from receipt of a notice of right to sue and the charging party has not filed suit and did not request a notice of right to sue pursuant to § 1601.28(a)(1) or (2), the notice of intent to reconsider will vacate the dismissal or letter of determination and revoke the notice of right to sue. If the 90 day period has expired, the charging party has filed suit, or the charging party had received a notice of right to sue pursuant to § 1601.28(a)(1) or (2), the notice of intent to reconsider will vacate the dismissal or letter of determination, but will not revoke the notice of right to sue. After reconsideration the issuing Director will issue a determination anew. In those circumstances where the notice of right to sue has been revoked, the issuing Director will, in accordance with § 1601.28, issue a notice of right to sue anew which will provide the charging party with 90 days within which to bring suit.

(2) When the issuing Director does reconsider, he or she shall provide prompt notification of his or her intent to reconsider, which is effective upon issuance, and final decision after reconsideration to the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, and the respondent, or in the charge or identified by the Commissioner in the third party certificate, if any, and the respondent.

(e) In making a determination as to whether reasonable cause exists, substantial weight shall be accorded final findings and orders made by designated 706 Agencies to which the Commission defers charges pursuant to § 1601.13. For the purposes of this section, the following definitions shall apply:

(1) "Final findings and orders" shall mean: (i) The findings of fact and order incident thereto issued by a 706 Agency on the merits of a charge; or

(ii) The consent order or consent decree entered into by the 706 Agency on the merits of a charge.

Provided, however, That no findings and order of a 706 Agency shall be considered final for purposes of this section unless the 706 Agency shall have served a copy of such findings and order upon the Commission and upon the person claiming to be aggrieved and shall have informed such person of his or her rights of appeal or to request reconsideration, or rehearing or similar rights; and the time for such appeal, reconsideration, or rehearing request shall have expired or the issues of such appeal, reconsideration or rehearing shall have been determined.

(2) "Substantial weight" shall mean that such full and careful consideration shall be accorded to final findings and orders, as defined above, as is appropriate in light of the facts supporting them when they meet all of the prerequisites set forth below:

(i) The proceedings were fair and regular; and

(ii) The practices prohibited by the State or local law are comparable in scope to the practices prohibited by Federal law; and

(iii) The final findings and order serve the interest of the effective enforcement of Title VII: *Provided,* That giving substantial weight to final findings and orders of a 706 Agency does not include according weight, for purposes of applying Federal law, to such Agency's conclusions of law.

[42 FR 55388, Oct. 14, 1977, as amended at 45 FR 73036, Nov. 4, 1980; 48 FR 19165, Apr. 28, 1983; 49 FR 13024, Apr. 2, 1984]

§ 1601.22 Confidentiality.

Neither a charge, nor information obtained pursuant to section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709 (c) and (d) of Title VII, shall be made matters of public information by the Commission prior to the institution of any proceedings under this Title involving such charge or information. This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State, and local authorities as may be appropriate or necessary to the carrying out of the Commission's function under Title VII, nor to the publication of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information.

PROCEDURE TO RECTIFY UNLAWFUL EMPLOYMENT PRACTICES

§ 1601.23 Preliminary or temporary relief.

(a) In the interest of the expeditious procedure required by section 706(f)(2) of Title VII, the Commission hereby delegates to the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Regional Programs, Office of Program Operations and each District Director the authority, upon the basis of a preliminary investigation, to make the initial determination on its behalf that prompt judicial action is necessary to carry out the purposes of the Act and recommend such action to the General Counsel. The Commission authorizes the General Counsel to institute an appropriate action on behalf of the Commission in such a case not involving a government, governmental agency, or political subdivision.

(b) In a case involving a government, governmental agency, or political subdivision, any recommendation for preliminary or temporary relief shall be transmitted directly to the Attorney General by the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Regional Programs, Office of Program Operations or the District Director.

(c) Nothing in this section shall be construed to prohibit private individuals from exercising their rights to seek temporary or preliminary relief on their own motion.

[42 FR 55388, Oct. 14, 1977, as amended at 47 FR 46275, Oct. 18, 1982]

§ 1601.24 Conciliation: Procedure and authority.

(a) Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, it shall endeavor to eliminate such practice by informal methods of conference, conciliation, and persuasion. In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief. Where such conciliation attempts are successful, the terms of the conciliation agreement shall be reduced to writing and shall be signed by the Commission's designated representative and the parties. A copy of the signed agreement shall be sent to the respondent and the person claiming to be aggrieved. Where a charge has been filed on behalf of a person claiming to be aggrieved, the conciliation agreement may be signed by the person filing the charge or by the person on whose behalf the charge was filed.

(b) District Directors; the Program Director, Office of Program Operations; or the Directors, Regional Programs, Office of Program Operations; or their designees, are hereby delegated authority to enter into informal conciliation efforts. District Directors or upon delegation, Area Directors, or Local Directors, the Program Director, Office of Program Operations; the Director of Systemic Programs, Office of Program Operations; or the Directors, Regional Programs, Office of Program Operations are hereby delegated the authority to negotiate and sign conciliation agreements. When a suit brought by the Commission is in litigation, the General Counsel is hereby delegated the authority to negotiate and sign conciliation agreements where, pursuant to section 706(f)(1) of Title VII, a court has stayed processings in the case pending further efforts of the Commission to obtain voluntary compliance.

(c) Proof of compliance with Title VII in accordance with the terms of the agreement shall be obtained by the Commission before the case is closed. In those instances in which a person claiming to be aggrieved or a member of the class claimed to be aggrieved by the practices alleged in the charge is not a party to such an agreement, the agreement shall not extinguish or in any way prejudice the rights of such person to proceed in court under section 706(f)(1) of Title VII.

[42 FR 55388, Oct. 14, 1977, as amended at 48 FR 19165, Apr. 28, 1983; 49 FR 13024, Apr. 2, 1984; 49 FR 13874, Apr. 9, 1984]

§ 1601.25 Failure of conciliation; notice.

Where the Commission is unable to obtain voluntary compliance as provided by Title VII and it determines that further efforts to do so would be futile or nonproductive, it shall, through the appropriate District Director, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Regional Programs, Office of Program Operations, or their designees, so notify the respondent in writing.

[42 FR 55388, Oct. 14, 1977, as amended at 47 FR 46275, Oct. 18, 1982]

§ 1601.26 Confidentiality of endeavors.

(a) Nothing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. This provision does not apply to such disclosures to the representatives of Federal, State or local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under Title VII: *Provided, however,* That the Commission may refuse to make disclosures to any such agency which does not maintain the confidentiality of such endeavors in accord with this section or in any circumstances where the disclosures will not serve the purposes of the effective enforcement of Title VII.

(b) Factual information obtained by the Commission during such informal endeavors, if such information is otherwise obtainable by the Commission under section 709 of Title VII, for disclosure purposes will be considered by the Commission as obtained during the investigatory process.

PROCEDURE CONCERNING THE INSTITUTION OF CIVIL ACTIONS

§ 1601.27 Civil actions by the Commission.

The Commission may bring a civil action against any respondent named in a charge not a government, governmental agency or political subdivision, after thirty (30) days from the date of the filing of a charge with the Commission unless a conciliation agreement acceptable to the Commission has been secured: *Provided, however,* That the Commission may seek preliminary or temporary relief pursuant to section 706(f)(2) of Title VII, according to the procedures set forth in § 1601.23 hereof, at any time.

§ 1601.28 Notice of right to sue: Procedure and authority.

(a) Issuance of notice of right to sue upon request. (1) When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued and the charge to which the request relates is filed against a respondent other than a government, governmental agency or political subdivision, the Commission shall promptly issue such notice as described in § 1601.28(e) to all parties, at any time after the expiration of one hundred eighty (180) days from the date of filing of the charge with the Commission, or in the case of a Commissioner charge 180 days after the filing of the charge or 180 days after the expiration of any period of reference under section 706(d) of Title VII as appropriate.

(2) When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued, and the charge to which the request relates is filed against a respondent other than a government, governmental agency or political subdivision, the Commission may issue such notice as described in § 1601.28(e) with copies to all parties, at any time prior to the expiration of 180 days from the date of filing the charge with the Commission; provided, that the District Director, the Area Director, the Local Director, the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Regional Programs, Office of Program Operations has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect.

(3) Issuance of a notice of right to sue shall terminate further proceeding of any charge not a Commissioner charge unless the District Director; Area Director; Local Director; Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Regional Programs, Office of Program Operations; or the General Counsel, determines at that time or at a later time that it would effectuate the purpose of Title VII to further process the charge. Issuance of a notice of right to sue shall not terminate the processing of a Commissioner charge.

(4) The issuance of a notice of right to sue does not preclude the Commission from offering such assistance to a person issued such notice as the Commission deems necessary or appropriate.

(b) Issuance of notice of right to sue following Commission disposition of charge. (1) Where the Commission has found reasonable cause to believe that the Act has been violated, has been unable to obtain voluntary compliance with Title VII, and where the Commission has decided not to bring a civil action against the respondent, it will issue a notice of right to sue on the charge as described in § 1601.28(e) to:

(i) The person claiming to be aggrieved, or,

(ii) In the case of a Commissioner charge, to any member of the class who is named in the charge, identified by the Commissioner in a third-party certificate, or otherwise identified by the Commision as a member of the class and provide a copy thereof to all parties.

(2) Where the Commission has entered into a conciliation agreement to which the person claiming to be aggrieved is not a party, the Commission shall issue a notice of right to sue on the charge to the person claiming to be aggrieved.

(3) Where the Commission has dismissed a charge pursuant to § 1601.19, it shall issue a notice of right to sue as described in § 1601.28(e) to:

(i) The person claiming to be aggrieved, or,

(ii) In the case of a Commissioner charge, to any member of the class who is named in the charge, identified by the Commissioner in a third-party certificate, or otherwise identified by the Commission as a member of the class, and provide a copy thereof to all parties.

(4) The issuance of a notice of right to sue does not preclude the Commission from offering such assistance to a person issued such notice as the Commission deems necessary or appropriate.

(c) The Commission hereby delegates authority to District Directors, Area Directors, Local Directors, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Regional Programs, Office of Program Operations, or their designees, to issue notices of right to sue, in accordance with this section, on behalf of the Commission. Where a charge has been filed on behalf of a person claiming to be aggrieved, the notice of right to sue shall be issued in the name of the person or organization who filed the charge.[1]

(d) Notices of right-of-sue for charges against Governmental respondents. In all cases where the respondent is a government, governmental agency, or a political subivision, the Commission will issue the notice of right to sue when there has been a dismissal of a charge. The notice of right to sue will be issued in accordance with § 1601.28(e). In all other cases where the respondent is a government, governmental agency, or political subdivision, the Attorney General will issue the notice of right to sue, including the following cases: (1) when there has been a finding of reasonable cause by the Commission, there has been a failure of conciliation, and the Attorney General has decided not to file a civil action; and (2) where a charging party has requested a notice of right to sue pursuant to § 1601.28(a)(1) or (2). In cases where a charge of discrimination results in a finding of cause in part and no cause in part, the case will be treated as a "cause" determination and will be referred to the Attorney General.

(e) Content of notice of right to sue. The notice of right to sue shall include:

(1) Authorization to the aggrieved person to bring a civil action pursuant to section 706(f)(1) of the Act within 90 days from receipt of such authorization;

(2) Advice concerning the institution of such civil action by the person claiming to be aggrieved, where appropriate;

(3) A copy of the charge;

(4) The Commission's decision, determination, or dismissal, as appropriate.

[42 FR 55388, Oct. 14, 1977, as amended at 44 FR 4669, Jan. 23, 1979; 45 FR 73037, Nov. 4, 1980; 47 FR 46275, Oct. 18, 1982; 48 FR 19165, Apr. 28, 1983; 49 FR 13024, Apr. 2, 1984; 49 FR 13874, Apr. 9, 1984]

§ 1601.29 Referral to the Attorney General.

If the Commission is unable to obtain voluntary compliance in a charge involving a government, governmental agency or political subdivision, it shall inform the Attorney General of the appropriate facts in the case with recommendations for the institution of a civil action by him or her against such respondent or for intervention by him or her in a civil action previously instituted by the person claiming to be aggrieved.

Subpart C—Notices to Employees, Applicants for Employment and Union Members

§ 1601.30 Notices to be posted.

(a) Every employer, employment agency, labor organization, and joint labor-management committee controlling an apprenticeship or other training program, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, members, and trainees, are customarily posted, the following notice:

EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW

DISCRIMINATION IS PROHIBITED

By the Civil Rights Act of 1964, as amended, and by Executive Order Numbers 11246 and 11375.

Title VII of the Civil Rights Act of 1964, as amended, administered by the Equal Employment Opportunity Commission prohibits discrimination because of Race, Color, Religion, Sex, or National Origin by employers with 15 or more employees, by Labor Organizations having a hiring hall or 15 or more members, by Employment Agencies, and by Joint Labor-Management Committees for Apprenticeship or Training.

Any person who believes he or she has been discriminated against should contact:

The Equal Employment Opportunity Commission, 2401 E Street N.W., Washington, D.C. 20506 or any of its district offices.

Executive Order Numbers 11246 and 11375 administered by the Office of Federal Contract Compliance Programs prohibits discrimination because of Race, Color, Religion, Sex or National Origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment by all Federal Government Contractors and Subcontractors, and by contractors and subcontractors performing work under a federally assisted construction contract regardless of the number of employees in either case.

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[1] Formal Ratification-Notice is hereby given that the EEOC at a Commission meeting on March 12, 1974, formally ratified the acts of the District Directors of EEOC District Offices in issuing notices of right to sue pursuant to Commission practice instituted on October 15, 1969, and continued through March 18, 1974. 39 FR 10178 (March 18, 1974).

Any person who believes he or she has been discriminated against should contact:

The Office of Federal Contract Compliance Programs, U.S. Department of Labor, Washington, D.C. 21210.

(b) Copies of such notice may be obtained on request from the Commission.

(c) Section 711(b) of Title VII makes failure to comply with this section punishable by a fine of not more than $100 for each separate offense.

Subpart D—Interpretations and Opinions by the Commission

§ 1601.31 Request for interpretation or opinion.

Any interested person desiring a written interpretation or opinion from the Commission may make a request therefor. However, issuance of such interpretations or opinions is discretionary.

§ 1601.32 Contents of request; where to file.

A request for an "opinion letter" shall be in writing, signed by the person making the request, addressed to the Chairman, Equal Employment Opportunity Commission, 2401 E Street NW., Washington, D.C. 20506, and shall contain:

(a) The names and addresses of the person making the request and of other interested persons.

(b) A statement of all known relevant facts.

(c) A statement of reasons why the interpretation or opinion should be issued.

§ 1601.33 Opinions—Title VII.

Only the following may be relied upon as a "written interpretation or opinion of the Commission" within the meaning of Section 713 of Title VII:

(a) A letter entitled "opinion letter" and signed by the Legal Counsel on behalf of and as approved by the Commission, or, if issued in the conduct of litigation, by the General Counsel on behalf of and as approved by the Commission, or

(b) Matter published and specifically designated as such in the FEDERAL REGISTER, including the Commission's Guidelines on Affirmative Action, or

(c) A Commission determination of no reasonable cause, issued, under the circumstances described in § 1608.10 (a) or (b) of the Commission's Guidelines on Affirmative Action, 29 CFR Part 1608, when such determination contains a statement that it is a "written interpretation or opinion of the Commission."

[49 FR 31411, Aug. 7, 1984]

Subpart E—Construction of Rules

§ 1601.34 Rules to be liberally construed.

These rules and regulations shall be liberally construed to effectuate the purpose and provisions of Title VII.

[44 FR 4670, Jan. 23, 1979]

Subpart F—Issuance, Amendment, or Repeal of Rules

§ 1601.35 Petitions.

Any interested person may petition the Commission, in writing, for the issuance, amendment, or repeal of a rule or regulation. Such petition shall be filed with the Equal Employment Opportunity Commission, 2401 E Street NW., Washington, D.C. 20506, and shall state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

§ 1601.36 Action on petition.

Upon the filing of such petition, the Commission shall consider the same and may thereupon either grant or deny the petition in whole or in part, conduct an appropriate proceeding thereon, or make other disposition of the petition. Should the petition be denied in whole or in part, prompt notice shall be given of the denial, accompanied by a simple statement of the grounds unless the denial be self-explanatory.

Subpart G—[Reserved]

Subpart H—706 Agency Designation Procedures

AUTHORITY: Sections 1601.75 through 1601.80 issued under 42 U.S.C. 2000e-8 and 2000e-12.

§ 1601.70 706 Agency Qualifications.

(a) State and local fair employment practice agencies or authorities which qualify under section 706(c) of Title VII and this section shall be designated as "706 Agencies." The qualifications for designation under section 706(c) are as follows:

(1) That the State or political subdivision has a fair employment practice law which makes unlawful employment practices based upon race, color, religion, sex or national origin; and

(2) That the State or political subdivision has either established a State or local authority or authorized an existing State or local authority that is empowered with respect to employment practices found to be unlawful, to do one of three things: To grant relief from the practice; to seek relief from the practice; or to institute criminal proceedings with respect to the practice.

(b) Any State or local agency or authority seeking 706 designation should submit a written request to the Program Director, Office of Program Operations. However, if the Commission is aware that an agency or authority meets the above criteria for 706 designation, the Commission shall defer charges to such agency or authority even though no request for 706 designation has been made.

(c) A request for 706 designation should include a copy of the agency's fair employment practices law and any rules, regulations and guidelines of general interpretation issued pursuant thereto. Submission of such data will allow the Commission to ascertain which employment practices are made unlawful and which bases are covered by the State or local entity. Agencies or authorities are requested, but not required, to provide the following helpful information:

(1) A chart of the organization of the agency or authority responsible for administering and enforcing said law;

(2) The amount of funds made available to or allocated by the agency or authority for fair employment purposes;

(3) The identity and telephone number of the agency (authority) representative whom the Commission may contact with reference to any legal or other questions that may arise regarding designation;

(4) A detailed statement as to how the agency or authority meets the qualifications of paragraph (a) (1) and (2) of § 1601.70.

(d) Where both State and local 706 Agencies exist, the Commission reserves the right to defer to the State 706 Agency only. However, where there exist Agencies of concurrent jurisdiction, the Commission may defer to the 706 Agency which would best serve the purposes of the Act, or to both.

(e) The Program Director, Office of Program Operations, will provide to the Attorney General of the concerned State (and corporation counsel of a concerned local government, if appropriate) an opportunity to comment upon aspects of State or local law which might affect the qualifications of any new agency in that State otherwise cognizable under this section.

[45 FR 33606, May 20, 1980, as amended at 47 FR 53733, Nov. 29, 1982]

§ 1601.71 706 Agency Notification.

(a) When the Program Director, Office of Program Operations, determines that an agency or authority meets the criteria outlined in § 706(c) of Title VII and § 1601.70, he or she shall so notify the agency by letter and shall notify the public by publication in the FEDERAL REGISTER of an amendment to § 1601.74.

(b) Where the Program Director, Office of Program Operations, determines that an agency or authority does not come within the definition of a 706 Agency for purposes of a particular basis of discrimination or where the agency or authority applies for designation as a Notice Agency, the Program Director, Office of Program Operations, shall notify that agency or authority of the filing of charges for which the agency or authority is not a 706 Agency. For such purposes that State or local agency will be deemed a Notice Agency.

(c) Where the Program Director, Office of Program Operations, becomes aware of events which lead him or her to believe that a deferral Agency no longer meets the requirements of a 706 Agency and should no longer be considered a 706 Agency, such Director will so notify the affected Agency and give it 15 days in which to respond to the preliminary findings. If the Director deems necessary, he or she may convene a hearing for the purpose of clarifying the matter. The Director shall render a final determination regarding continuation of the Agency as a 706 Agency.

[45 FR 33606, May 20, 1980, as amended at 47 FR 53733, Nov. 29, 1982]

§§ 1601.72—1601.73 [Reserved]

§ 1601.74 Designated and notice agencies.

(a) The designated 706 agencies are:

Alaska Commission for Human Rights
Alexandria (Va.) Human Rights Office
Allentown (Pa.) Human Relations Commission
Anchorage (Alaska) Equal Rights Commission
Arizona Civil Rights Division
Austin (Tex.) Human Relations Commission [2]
Baltimore (Md.) Community Relations Commission
Bloomington (Ill.) Human Relations Commission
Bloomington (Ind.) Human Rights Commission
Broward County (Fla.) Human Relations Commission
California Department of Fair Employment and Housing
Charleston (W. Va.) Human Rights Commission
City of Salina (Kansas) Human Relations Commission and Department
Clearwater (Fla.) Office of Community Relations
Colorado Civil Rights Commission
Colorado State Personnel Board [3]
Commonwealth of Puerto Rico Department of Labor [4]
Connecticut Commission on Human Rights and Opportunity
Corpus Christi (Tex.) Human Relations Commission
Dade County (Fla.) Fair Housing and Employment Commission
Delaware Department of Labor
District of Columbia Office of Human Rights
East Chicago (Ind.) Human Rights Commission
Evansville (Ind.) Human Relations Commission
Fairfax County (Va.) Human Rights Commission
Florida Commission on Human Relations
Fort Wayne (Ind.) Metropolitan Human Relations Commission
Fort Worth (Tex.) Human Relations Commission
Gary (Ind.) Human Relations Commission
Georgia Office of Fair Employment Practices [5]

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[2] The Austin (Texas) Human Relations Commission has been designated as a 706 Agency for all charges except charges alleging a violation of Title VII by a government, government agency, or political subdivision of the State of Texas.

For these types of charges it shall be deemed a "Notice Agency," pursuant to 29 CFR 1601.71(3).

[3] The Colorado State Personnel Board has been designated as a 706 Agency for only those charges which relate to appointments, promotions, and other personnel actions that take place in the state personnel system. In addition, it has been designated as a 706 Agency for all of the above mentioned charges except charges which allege a violation of Section 704(a) of Title VII. For this type of charge it shall be deemed a "Notice Agency" pursuant to 29 CFR 1601.71(3).

[4] The Commonwealth of Puerto Rico Department of Labor has been designated as a 706 Agency for all charges except (1) charges alleging a violation of Title VII on the basis of national origin; (2) charges alleging a "labor union" has violated Title VII; (3) charges alleging an "Employment Agency" has violated Title VII; (4) charges alleging violations of Title VII by agencies or instrumentalities of the Government of Puerto Rico when they are not operating as private businesses or enterprises; and (5) all charges alleging violations of sec. 704(a) or Title VII.

For these types of charges it shall be deemed a "Notice Agency," pursuant to 29 CFR 1601.71(3)

[5] The Georgia Office of Fair Employment Practices has been designated as a 706

Continued

Hawaii Department of Labor and Industrial Relations [6]

Howard County (Md.) Human Rights Commission [7]

Huntington (WV.) Human Relations Commission

Idaho Human Rights Commission

Illinois Department of Human Rights

Indiana Civil Rights Commission

Iowa Civil Rights Commission

Jacksonville (Fl.) Equal Employment Opportunity Commission

Kansas City (KS) Human Relations Department

Kansas City (MO) Human Relations Department

Kansas Commission on Human Rights

Kentucky Commission on Human Rights

Lexington-Fayette (Ky.) Urban County Human Rights Commission

Lincoln (Neb.) Commission on Human Rights [8]

Louisville and Jefferson County (Ky.) Human Relations Commission.

Madison (Wi.) Equal Opportunities Commission

Maine Human Rights Commission

Maryland Commission on Human Relations

Mason City Iowa Human Rights Commission

Massachusetts Commission Against Discrimination

Michigan City (IN) Human Rights Commission, Richmond County (GA) Human Rights Commission

Michigan Department of Civil Rights

Minneapolis (Minn.) Department of Civil Rights

Minnesota Department of Human Rights

Missouri Commission on Human Rights

Montana Human Rights Division

Montgomery County (Md.) Human Relations Commission

Nebraska Equal Opportunity Commission

Nevada Commission on Equal Rights of Citizens

New Hampshire Commission for Human Rights

New Hanover (NC) Human Relations Commission [9]

New Haven, Connecticut Commission on Equal Opportunities

New Jersey Division of Civil Rights, Department of Law and Public Safety

New Mexico Human Rights Commission

New York City (N.Y.) Commission on Human Rights

New York State Division on Human Rights

North Carolina State Personnel Commission [10]

Agency for all charges covering the employment practices of the departments of the State of Georgia only.

[6] The Hawaii Department of Labor and Industrial Relations has been granted 706 designation of all charges except those filed against units of the State and local government, in which case it shall be deemed a "Notice Agency."

[7] The Howard County (Maryland) Human Rights Commission has been granted designation of all charges except those filed against agencies of Howard County in which case it shall be deemed a "Notice Agency."

[8] The Lincoln (Nebraska) Commission on Human Rights has been designated as a 706 Agency for all charges except (1) a charge by an "applicant for membership" alleging a violation of sec. 703(c)(2) of Title VII (2) a charge by an individual alleging that a "joint labor-management committee" has violated sec. 704(a) of Title VII; and (3) a charge by an individual alleging that a "joint labor-management committee" has violated sec. 704(b) of Title VII.

For those types of charges, it shall be deemed a "Notice Agency," pursuant to 29 CFR 1601.71(3).

[9] The New Hanover Human Relations Commission is being designated as a 706 Agency for charges covering employment practices under § 706(c) of Title VII and CFR 1601.70 et seq. (1980) within New Hanover County and "such cities within the county as may by resolution of their governing boards, permit the Ordinance of the Board of Commissioners of New Hanover County entitled 'Prohibition of Discrimination in Employment' to be applicable within such cities." This covers Wilmington City and the unincorporated area of New Hanover County. At this time Wrightsville Beach, Carolina Beach and Kure Beach are not included in this designation. For charges from these latter locales the New Hanover Human Relations Commission shall be deemed a "Notice Agency," pursuant to 29 CFR 1601.71(b).

[10] The North Carolina State Personnel Commission is being designated as a 706 Agency for those charges filed by State Employees, employees of local social service departments, public health departments and mental health clinics, employees of local civil defense agencies which receive federal grant-in-aid funds and other county employees which the several boards of County Commissioners may from time to time determine.

This designation does not include charges filed by public school superintendents, principals, teachers, other public school employees, employees of the Office of The Governor and Lieutenant Governor. For these types of charges it shall be deemed to "Notice Agency" pursuant to 29 CFR 1601.71(b).

North Dakota Department of Labor
Ohio Civil Rights Commission
Oklahoma Human Rights Commission
Omaha (Neb.) Human Relations Department
Oregon Bureau of Labor
Orlando (Fla.) Human Relations Department
Paducah, Kentucky Human Rights Commission
Pennsylvania Human Relations Commission
Philadelphia (Pa.) Commission on Human Relations
Pinellas County, Florida Affirmative Action Office
Pittsburgh (Pa.) Commission on Human Rights
Prince George's County (Md.) Human Relations Commission
Rhode Island Commission for Human Rights
Rockville (Md.) Human Rights Commission
St. Louis (Mo.) Civil Rights Enforcement Agency
St. Paul (Mn.) Department of Human Rights
St. Petersburg (Fla.) Human Relations Division [11]
Seattle (Wash.) Human Rights Commission
Sioux Falls (S.D.) Human Relations Commission
South Bend (Ind.) Human Rights Commission
South Carolina Human Affairs Commission
South Dakota Division of Human Rights
Springfield (Ohio.) Human Relations Department
Tacoma (Wash.) Human Relations Commission
Tennessee Commission for Human Development
Texas Commission on Human Rights
Topeka, Kansas Human Relations Commission
Utah Industrial Commission, Anti-Discrimination Division
Vermont Attorney General's Office, Civil Rights Division
Virgin Islands Department of Labor
Washington Human Rights Commission
West Virginia Human Rights Commission
Wheeling (W. Va.) Human Rights Commission
Wisconsin Equal Rights Division, Department of Industry, Labor and Human Relations
Wisconsin State Personnel Commission [12]
Wyoming Fair Employment Practices Commission
York (Pa.) Human Relations Commission

(b) The designated Notice Agencies are:

Arkansas Governor's Committee on Human Resources
Ohio Director of Industrial Relations
Raleigh (N.C.) Human Resources Department, Civil Rights Unit

(Sec. 713(a) 78 Stat. 265 (42 U.S.C. 2000e—12(a)))

[46 FR 33030, June 26, 1981]

EDITORIAL NOTE: For Federal Register citations affecting § 1601.74, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 1601.75 Certification of designated 706 agencies.

(a) The Commission may certify designated 706 agencies based upon the past, satisfactory performance of those agencies. The effect of such certification is that the Commission shall accept the findings and resolutions of designated 706 agencies in regard to cases processed under contracts with those agencies, as provided in section 706(b) of Title VII, without individual, case-by-case substantial weight review by the Commission except as provided in §§ 1601.76 and 1601.77 of this part.

(b) Eligibility criteria for certification of a designated 706 agency are as follows:

(1) That the State or local agency has been a designated 706 agency for 4 years;

(2) That the State or local designated 706 agency's work product has been evaluated within the past 12 months by the operations Evaluation Division, Office of Field Services, and found to

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[11] On June 1, 1979, the St. Petersburg Office of Human Relations was designated a 706 Agency for all charges except those charges alleging retaliation under 704(a) of Title VII. Accordingly, "for retaliation charges" it was deemed a "Notice Agency," pursuant to 29 CFR 1601.71(c). See 44 FR 31638. On May 23, 1979, an ordinance amended the St. Petersburg, Fla. Human Relations law to include charges of retaliation. Therefore, retaliation charges will be deferred to that agency effective immediately.

[12] The Wisconsin State Personnel Commission is being designated as a 706 Agency for all charges covering the employment practices of the agencies of the State of Wisconsin except those charges alleging retaliation under 704(a) of Title VII. Accordingly, for retaliation charges, it shall be deemed a Notice Agency pursuant to 29 CFR 1601.71(3).

be in conformance with the Commission's Substantial Weight Review Procedures (EEOC Order 916); and

(3) That the State or local designated 706 agency's findings and resolutions pursuant to its contract with the Commission, as provided in section 709(b) of Title VII, have been accepted by the Commission in at least 95% of the cases processed by the 706 agency in the past 12 months.

(c) Upon Commission approval of a designated 706 agency for certification, it shall notify the agency of its cetification and shall effect such certification by issuance and publication of an amendment to § 1601.80 of this part.

[46 FR 50367, Oct. 13, 1981]

§ 1601.76 Right of party to request review.

The Commission shall notify the parties whose cases are to be processed by the designated, certified 706 agency of their right, if aggrieved by the agency's final action, to request review by the Commission within 15 days of that action. The Commission, on receipt of a request for review, shall conduct such review in accord with the procedures set forth in the Substantial Weight Review Procedures (EEOC Order 916).

[46 FR 50367, Oct. 13, 1981]

§ 1601.77 Review by the Commission.

After a designated 706 agency has been certified, the Commission shall accept the findings and resolutions of that agency as final in regard to all cases processed under contract with the Commission, as provided in section 709(b) of Title VII, except that the Commission shall review charges closed by the certified 706 agency for lack of jurisdiction, as a result of unsuccessful conciliation, or where no previously issued Commission decision serves as precedent for the determination in the charge.

[46 FR 50367, Oct. 13, 1981]

§ 1601.78 Evaluation of designated 706 agencies certified by the Commission.

To assure that designated 706 agencies certified by the Commission, as provided in § 1601.75 of this part, continue to maintain performance consistent with the Commission's Substantial Weight Review Procedures (EEOC Order 916), the Commission shall provide for the evaluation of such agencies as follows:

(a) Each designated 706 agency certified by the Commission shall be evaluated at least once every 3 years; and

(b) Each designated 706 agency certified by the Commission shall be evaluated when, as a result of a substantial weight review requested as provided in § 1601.76 of this part or required in regard to cases closed as a result of unsuccessful conciliation or for lack of jurisdiction as provided in § 1601.77 of this part, the Commission rejects more than 5% of a designated 706 agency's findings at the end of the year or 20% or more of its findings for two consecutive quarters. When the Commission rejects 20% or more of a designated 706 agency's findings during any quarter, the Commission shall initiate an inquiry and may conduct an evaluation.

(c) The Commission may, on its own motion, require an evaluaiton at any time.

[46 FR 50367, Oct. 13, 1981]

§ 1601.79 Revocation of certification.

Certification of a designated 706 agency is discretionary with the Commission and the Commission may, upon its own motion, withdraw such certification as a result of an evaluation conducted pursuant to § 1601.78 or for any reason which leads the Commission to believe that such certification no longer serves the interest of effective enforcement of Title VII. The Commission will accept comments from any individual or organization concerning the efficacy of the certification of any designated 706 agency. The revocation shall be effected by the issuance and publication of an amendment to § 1601.80 of this part.

[46 FR 50367, Oct. 13, 1981]

§ 1601.80 Certified designated 706 agencies.

The designated 706 agencies receiving certification by the Commission are as follows:

Alaska Commission for Human Rights

Alexandria (Va.) Human Rights Office
Arizona Civil Rights Division
Austin Human Relations Commission
Baltimore (Md.) Community Relations Commission
California Department of Fair Employment and Housing
Colorado Civil Rights Division
Connecticut Commission on Human Rights and Opportunity
Corpus Christi Human Relations Commission
Dade County (Fla.) Fair Housing and Employment Commission
District of Columbia Office of Human Rights
East Chicago (Ind.) Human Rights Commission
Fairfax County (Va.) Human Rights Commission
Florida Commission on Human Rights
Fort Wayne (Ind.) Metropolitan Human Relations Commission
Fort Worth (Tex.) Human Relations Commission
Gary (Ind.) Human Relations Commission
Hawaii Department of Labor and Industrial Relations
Idaho Human Rights Commission
Illinois Department of Human Rights
Indiana Civil Rights Commission
Iowa Civil Rights Commission
Jacksonville (Florida) Equal Employment Opportunity Commission
Kansas Commission on Civil Rights
Lexington-Fayette (Ky.) Urban County Human Rights Commission
Maine Human Rights Commission
Maryland Commission on Human Relations
Massachusetts Commission Against Discrimination
Michigan Department of Civil Rights
Minneapolis (Minn.) Department of Civil Rights
Minnesota Department of Human Rights
Missouri Commission on Civil Rights
Montana Human Rights Division
Nebraska Equal Opportunity Commission
Nevada Commission on Equal Rights of Citizens
New Hampshire Commission for Human Rights
New Jersey Division on Civil Rights
New York City (N.Y.) Commission on Human Rights
New York State Division on Human Rights
Ohio Civil Rights Commission
Oklahoma Human Rights Commission
Omaha (Nebr.) Human Relations Department
Oregon Bureau of Labor
Orlando (Fla.) Human Relations Department
Pennsylvania Human Relations Commission
Philadelphia Commission on Human Relations
Pittsburgh Commission on Human Relations
Puerto Rico Department of Labor and Human Resources
Rhode Island Commission for Human Rights
St. Louis, Missouri Civil Rights Enforcement Agency
Seattle (Wash.) Human Rights Commission
South Bend (Ind.) Human Rights Commission
South Carolina Human Affairs Commission
South Dakota Division of Human Rights
Tacoma (Wash.) Human Relations Division
Utah Industrial Commission, Anti-Discrimination Division
Vermont Attorney General's Office, Civil Rights Division
Virgin Islands Department of Labor
Washington Human Rights Commission
West Virginia Human Rights Commission
Wisconsin Equal Rights Division, Department of Industry, Labor and Human Relations
Wyoming Fair Employment Practices Commission

(42 U.S.C. 2000e—12(a))

[46 FR 50367, Oct. 13, 1981, as amended at 46 FR 62056, Dec. 22, 1981; 48 FR 38231, Aug. 23, 1983; 48 FR 51773, Nov. 14, 1983; 48 FR 54222, Dec. 1, 1983; 49 FR 6368, Feb. 21, 1984; 49 FR 24721, June 15, 1984; 49 FR 36086, Sept. 14, 1984; 49 FR 38252, Sept. 28, 1984; 49 FR 45424, Nov. 16, 1984; 49 FR 50718, Dec. 31, 1984]

PART 1602—RECORDS AND REPORTS

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AUTHORITY: Secs. 709, 713, 78 Stat. 263, 265; 42 U.S.C. 2000e-8, 2000e-12, unless otherwise noted.

§ 1602.1 General.

(a) Section 709 of title VII requires the Commission to establish regulations pursuant to which employers, labor organizations, joint labor-management committees, and employment agencies subject to said title shall make and preserve certain records and shall furnish specified information to aid in the administration and enforcement of the Title.

(b) This Part 1602 sets forth the procedure to be used by the Commission in establishing, amending and revoking such regulations, and by future amendments will set forth regulations so established.

[30 FR 8409, July 1, 1965]

Subpart A—Procedure

SOURCE: 30 FR 8409, July 1, 1965; 31 FR 2832, Feb. 17, 1966, unless otherwise noted.

§ 1602.2 Initiating a proceeding.

The Commission, on its own motion, or upon the petition of an interested person submitted as provided in § 1601.32 of this chapter, may initiate a proceeding to make, amend, or revoke regulations requiring persons subject to Title VII to make or keep records or to provide information in accordance with section 709.

§ 1602.3 Notice of a proceeding.

(a) Notice of the institution of a proceeding shall be published in the FEDERAL REGISTER. Such notice shall (1) refer to section 709 as authority for the proposed regulations and direct attention to this Part 1602 governing the procedure; (2) contain the terms or substance of the proposed regulations; and (3) invite interested persons (i) to participate in a public hearing to be held with respect to the proposed regulations specifying the time and place that such hearing shall commence and information that must be submitted earlier by persons desiring to participate, and (ii) to submit pertinent written data, views, and argument by means other than participation in a hearing, specifying the time and place for such submission.

(b) The Commission may also give additional notice of the initiation of a proceeding as it may deem necessary or appropriate.

§ 1602.4 Procedure governing public hearings.

A hearing under § 1602.3 shall be conducted by a member of the Commission or its designated representative who shall have authority to administer oaths and affirmations. Such hearing shall be stenographically reported, and transcripts shall be made available to interested persons upon such terms as the Commission may provide. Matters which the Commission may wish to be made a part of the record shall be presented at the hearing by an attorney designated by the Commission who may call and examine witnesses, and cross-examine witnesses called by other persons. Subject to such limitations as the presiding officer may impose to limit the record to pertinent matters, every interested person shall be afforded the opportunity to offer evidence through witnesses, to cross-examine witnesses called by others, and to present argument. The presiding officer shall regulate the course of the hearing and shall dispose of procedural requests, objections and comparable matters. The presiding officer shall also have power to call and examine witnesses, to govern the content of the record, to exclude persons from the hearing room for good cause, and, upon the conclusion of the testimony, to keep the hearing open for a stated reasonable time in order to receive written proposals and supporting reasons.

§ 1602.5 Decision.

After the close of the hearing and the receipt of materials under § 1602.3(a) (3) (ii), the Commission shall carefully consider all matters presented to it and any other matter available, and shall thereafter make a final decision adopting, rejecting, or modifying the proposed regulation. The decision shall be expressed in a document signed by the Chairman of the Commission on behalf of the Commission and shall be published in the FEDERAL REGISTER as an amendment to this Part 1602.

§ 1602.6 Effective date of recordkeeping and reporting rules.

Except to the extent that such decision of the Commission relieves a restriction, it shall provide an effective date for the change of not less than 30 days after the date of its publication in the FEDERAL REGISTER unless a shorter time is provided for good cause found and expressed in the document.

Subpart B—Employer Information Report

SOURCE: 31 FR 2833, Feb. 17, 1966, unless otherwise noted.

§ 1602.7 Requirement for filing of report.

On or before March 31, 1967, and annually thereafter, every employer subject to title VII of the Civil Rights Act of 1964 which meets the 100-employee test set forth in section 701(b) thereof shall file with the Commission or its delegate executed copies of Standard Form 100, as revised (otherwise known as "Employer Information Report EEO-1") in conformity with the directions set forth in the form and accompanying instructions. Notwithstanding the provisions of § 1602.14, every such employer shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent report filed for each such unit and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of title VII. Appropriate copies of Standard Form 100 in blank will be supplied to every employer known to the Commission to be subject to the reporting requirements, but it is the responsibility of all such employers to obtain necessary supplies of same prior to the filing date from the Joint Reporting Committee, Federal Depot, 1201 East 10 Street, Jeffersonville, IN 47130

[37 FR 9219, May 6, 1972]

§ 1602.8 Penalty for making of willfully false statements on report.

The making of willfully false statements on Report EEO-1 is a violation of the United States Code, Title 18, section 1001, and is punishable by fine or imprisonment as set forth therein.

§ 1602.9 Commission's remedy for employer's failure to file report.

Any employer failing or refusing to file Report EEO-1 when required to do so may be compelled to file by order of a U.S. District Court, upon application of the Commission.

§ 1602.10 Employer's exemption from reporting requirements.

If an employer is engaged in activities for which the reporting unit criteria described in section 4(c) of the Instructions are not readily adaptable, special reporting procedures may be required. In such case, the employer should so advise by submitting to the Commission or its delegate a specific proposal for an alternative reporting system prior to the date on which the report is due. If it is claimed that the preparation or filing of the report would create undue hardship, the employer may apply to the Commission for an exemption from the requirements set forth in this part.

§ 1602.11 Additional reporting requirements.

The Commission reserves the right to require reports, other than that designated as the Employer Information Report EEO-1, about the employment practices of individual employers or groups of employers whenever, in its judgment, special or supplemental reports are necessary to accomplish the purposes of title VII. Any system for the requirement of such reports will be established in accordance with the procedures referred to in section 709(c) of title VII and as otherwise prescribed by law.

Subpart C—Recordkeeping by Employers

SOURCE: 31 FR 2833, Feb. 17, 1966, unless otherwise noted.

§ 1602.12 Records to be made or kept.

The Commission has not adopted any requirement, generally applicable to employers, that records be made or kept. It reserves the right to impose recordkeeping requirements upon individual employers or groups of employers subject to its jurisdiction whenever, in its judgment, such records (a) are necessary for the effective operation of the EEO-1 reporting system or of any special or supplemental reporting system as described above; or (b) are further required to accomplish the purposes of Title VII. Such recordkeeping requirements will be adopted in accordance with the procedures referred to in section 709(c), and otherwise prescribed by law.

(Approved by the Office of Management and Budget under control number 3046-0007)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[31 FR 2833, Feb. 17, 1966, as amended at 46 FR 63268, Dec. 31, 1981]

§ 1602.13 Records as to racial or ethnic identity of employees.

Employers may acquire the information necessary for completion of Items 5 and 6 of Report EEO-1 either by visual surveys of the work force, or at their option, by the maintenance of post-employment records as to the identity of employees where the same is permitted by State law. In the latter case, however, the Commission recommends the maintenance of a permanent record as to the racial or ethnic identity of an individual for purpose of completing the report form only where the employer keeps such records separately from the employee's basic personnel form or other records available to those responsible for personnel decisions, e.g., as part of an automatic data processing system in the payroll department.

§ 1602.14 Preservation of records made or kept.

(a) Any personnel or employment record made or kept by an employer (including but not necessarily limited to application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of 6 months from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of 6 months from the date of termination. Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under title VII, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action. The term "personnel records relevant to the charge," for example, would include personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected. The date of "final disposition of the charge or the action" means the date of expiration of the statutory period within which the aggrieved person may bring an action in a U.S. District Court or, where an action is brought against an employer either by the aggrieved person, the Commission, or by the Attorney General, the date on which such litigation is terminated.

(b) The requirements of this section shall not apply to application forms and other preemployment records of applicants for positions known to applicants to be of a temporary or seasonal nature.

(Approved by the Office of Management and Budget under control number 3046-0007)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[37 FR 9219, May 6, 1972, as amended at 46 FR 63268, Dec. 31, 1981]

Subpart D—Apprenticeship Information Report

SOURCE: 32 FR 10650, July 20, 1967, unless otherwise noted.

§ 1602.15 Requirement for filing and preserving copy of report.

On or before September 30, 1967, and annually thereafter, certain joint labor-management committees subject to title VII of the Civil Rights Act of 1964 which control apprenticeship programs shall file with the Commission, or its delegate, executed copies of Apprenticeship Information Report EEO-2 in conformity with the directions set forth in the form and accompanying instructions. The committees covered by this regulation are those which (a) have five or more apprentices enrolled in the program at any time during August and September of the reporting year, and (b) represent at least one employer sponsor and at least one labor organization sponsor which are themselves subject to title VII. Every such committee shall retain at all times among the records maintained in the ordinary course of its affairs a copy of the most recent report filed, and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of title VII. It is the responsibility of all such committees to obtain from the Commission or its delegate necessary supplies of the form.

[37 FR 9220, May 5, 1972]

§ 1602.16 Penalty for making of willfully false statements on report.

The making of willfully false statements on Report EEO-2 is a violation of the U.S. Code, Title 18, section 1001, and is punishable by fine or imprisonment as set forth therein.

§ 1602.17 Commission's remedy for failure to file report.

Any person failing or refusing to file Report EEO-2 when required to do so may be compelled to file by order of a U.S. District Court, upon application of the Commission, under authority of section 709(c) of title VII.

[37 FR 9220, May 6, 1972]

§ 1602.18 Exemption from reporting requirements.

If it is claimed that the preparation or filing of Report EEO-2 would create undue hardship, the committee may apply to the Commission for an exemption from the requirements set forth in this part.

§ 1602.19 Additional reporting requirements.

The Commission reserves the right to require reports, other than that designated as Report EEO-2, about apprenticeship procedures of joint labor-management committees, employers, and labor organizations whenever, in its judgment, special or supplemental reports are necessary to accomplish the purpose of Title VII. Any system for the requirement of such reports will be established in accordance with the procedures referred to in section 709(c) of title VII and as otherwise prescribed by law.

Subpart E—Apprenticeship Recordkeeping

§ 1602.20 Records to be made or kept.

(a) Every person required to file Report EEO-2 shall make or keep such records as are necessary for its completion under the conditions and circumstances set forth in the instructions accompanying the report, which are specifically incorporated herein by reference and have the same force and effect as other sections of this part.

(b) Every employer, labor organization, and joint labor-management committee subject to Title VII which controls an apprenticeship program (regardless of any joint or individual obligation to file a report) shall beginning August 1, 1967, maintain a list in chronological order containing the names and addresses of all persons who have applied to participate in the apprenticeship program, including the dates on which such applications were received. (See section 709(c), title VII, Civil Rights Act of 1964.) Such list shall, contain a notation of the sex of the applicant and of the applicant's identification as "White," "Black," "Hispanic," "Asian or Pacific Islander" or "American Indian or Alaskan Native." The methods of making such identification are set forth in the instruction accompanying Report EEO-2. The words "applied," "applicant" and "application" as used in this section refer to situations involving actual applications only. An applicant is considered to be a person who files a formal application, or in some informal way indicates a specific intention to be considered for admission to the apprenticeship program. A person who casually appears to make an informal inquiry about the program, or about apprenticeship in general, is not considered to be an applicant. The term "apprenticeship program" as used herein refers to programs described in the instructions accompanying Report EEO-2.

(c) In lieu of maintaining the chronological list referred to in § 1602.20 (b), persons required to compile the list may maintain on file written applications for participation in the apprenticeship program, provided that the application form contains a notation of the date the form was received, the address of the applicant, and a notation of the sex, and the race, color, or national origin of the applicant as described above.

[32 FR 10650, July 20, 1967, as amended at 33 FR 282, Jan. 9, 1968; 42 FR 33557, Aug. 10, 1977]

§ 1602.21 Preservation of records made or kept.

(a) Notwithstanding the provisions of section 1602.14, every person subject to § 1602.20 (b) or (c) shall preserve the list of applicants or application forms, as the case may be, for a period of 2 years from the date the application was received, except that in those instances where an annual report is required by the Commission calling for statistics as to the sex, and the race, color, or national origin of apprentices, the person required to file the report shall preserve the list and forms for a period of 2 years or the period of a successful applicant's apprenticeship, whichever is longer. Persons required to file Report EEO-2, or other reports calling for information about the operation of an apprenticeship program similar to that required on Report EEO-2, shall preserve any other record made solely for the purpose of completing such reports for a period of 1 year from the due date thereof.

(b) Other records: Except to the extent inconsistent with the law or regulation of any State or local fair employment practices agency, or of any other Federal or State agency involved in the enforcement of an antidiscrimination program in apprenticeship, other records relating to apprenticeship made or kept by a person required to file Report EEO-2, including but not necessarily limited to test papers completed by applicants for apprenticeship and records of interviews with applicants, shall be kept for a period of 2 years from the date of the making of the record. Where a charge of discrimination has been filed, or an action brought by the Attorney General under Title VII, the respondent shall preserve all records relevant to the charge or action until final disposition of the charge or the action. The term "records relevant to the charge," for example, would include applications, forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the charging party applied and was rejected. The date of "final disposition of the charge or the action" means the date of expiration of the statutory period within which a charging party may bring an action in a U.S. District Court or, where an action is brought either by a charging party or by the Attorney General, the date on which such litigation is terminated.

[32 FR 10660, July 20, 1967]

Subpart F—Local Union Equal Employment Opportunity Report

SOURCE: 32 FR 10651, July 20, 1967, unless otherwise noted.

§ 1602.22 Requirements for filing and preserving copy of report.

On or before November 30, 1967, and annually thereafter, every labor organization subject to title VII of the Civil Rights Act of 1964 shall file with the Commission or its delegate an executed copy of Local Union Equal Employment Opportunity Report EEO-3 in conformity with the directions set forth in the form and accompanying instructions, provided that the labor organization has 100 or more members at any time during the 12 months preceding the due date of the report, and is a "local union" (as that term is commonly understood) or an independent or unaffiliated union. Labor organizations required to report are those which perform, in a specific jurisdiction, the functions ordinarily performed by a local union, whether or not they are so designated. Every local union or a labor organization acting in its behalf, shall retain at all times among the records maintained in the ordinary course of its affairs a copy of the most recent report filed, and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of title VII. It is the responsibility of all persons required to file to obtain from the Commission or its delegate necessary supplies of the form.

[37 FR 9220, May 6, 1972]

§ 1602.23 Penalty for making of willfully false statements on reports.

The making of willfully false statements on Report EEO-3 is a violation of the United States Code, Title 18, section 1001, and is punishable by fine or imprisonment as set forth herein.

§ 1602.24 Commission's remedy for failure to file report.

Any person failing or refusing to file Report EEO-3 when required to do so may be compelled to file by order of a U.S. District Court, upon application of the Commission, under authority of section 709(c) of title VII.

[37 FR 9220, May 6, 1972]

§ 1602.25 Exemption from reporting requirements.

If it is claimed that the preparation or filing of Report EEO-3 would create undue hardship, the labor organization may apply to the Commission for an exemption from the requirements set forth in this part.

§ 1602.26 Additional reporting requirements.

The Commission reserves the right to require reports, other than that designated as Report EEO-3, about the membership or referral practices or other procedures of labor organizations, whenever, in its judgment, special or supplemental reports are necessary to accomplish the purposes of Title VII. Any system for requirement of such reports will be established in accordance with the procedures referred to in section 709(c), and as otherwise prescribed by law.

Subpart G—Recordkeeping by Labor Organizations

§ 1602.27 Records to be made or kept.

Those portions of Report EEO-3 calling for information about union policies and practices and for the compilation of statistics on the race, color, national origin, and sex of members, persons referred, and apprentices, are deemed to be "records" within the meaning of section 709(c), title VII, Civil Rights Act of 1964. Every local, independent, or unaffiliated union with 100 or more members (or any agent acting in its behalf, if the agent has responsibility for referral of persons for employment) shall make these records or such other records as are necessary for the completion of Report EEO-3 under the circumstances and conditions set forth in the instructions accompanying it, which are specifically incorporated herein by reference and have the same force and effect as other sections of this part.

(Approved by the Office of Management and Budget under control number 3046-0006)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[32 FR 10651, July 20, 1967, as amended at 46 FR 63268, Dec. 31, 1981]

§ 1602.28 Preservation of records made or kept.

(a) All records made by a labor organization or its agent solely for the purpose of completing Report EEO-3 shall be preserved for a period of 1 year from the due date of the report for which they were compiled. Any labor organization identified as a "referral union" in the instructions accompanying Report EEO-3, or agent thereto, shall preserve other membership or referral records (including applications for same) made or kept by it for a period of 6 months from the date of the making of the record. Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against a labor organization under title VII, the respondent labor organization shall preserve all records relevant to the charge or action until final disposition of the charge or the action. The date of "final disposition of the charge or the action" means the date of expiration of the statutory period within which the aggrieved person may bring an action in a U.S. District Court or, where an action is brought against a labor organization either by the Commission, the aggrieved person, or by the Attorney General, the date on which such litigation is terminated.

(b) Nothing herein shall relieve any labor organization covered by title VII of the obligations set forth in Subpart E, §§ 1602.20 and 1602.21, relating to the establishment and maintenance of a list of applicants wishing to participate in an apprenticeship program controlled by it.

(Approved by the Office of Management and Budget under control number 3046-0006)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[37 FR 9220, May 6, 1972, as amended at 46 FR 63268, Dec. 31, 1981]

Subpart H—Records and Inquiries as to Race, Color, National Origin, or Sex

§ 1602.29 Applicability of State or local law.

The requirements imposed by the Equal Employment Opportunity Commission in these regulations, Subparts D through G, supersede any provisions of State or local law which may conflict with them. Any State or local laws prohibiting inquiries and recordkeeping with respect to race, color, national origin, or sex do not apply to inquiries required to be made under these regulations and under the instructions accompanying Reports EEO-2 and EEO-3.

[32 FR 10652, July 20, 1967]

Subpart I—State and Local Governments Recordkeeping

§ 1602.30 Records to be made or kept.

On or before September 30, 1974, and annually thereafter, every political jurisdiction with 15 or more employees is required to make or keep records and the information therefrom which are or would be necessary for the completion of report EEO-4 under the circumstances set forth in the instructions thereto, whether or not the political jurisdiction is required to file such report under § 1602.32 of the regulations in this part. The instructions are specifically incorporated herein by reference and have the same force and effect as other sections of this part.[1] Such reports and the information therefrom shall be retained at all times for a period of 3 years at the central office of the political jurisdiction and shall be made available if requested by an officer, agent, or employee of the Commission under section 710 of title VII, as amended. Although agency data are aggregated by functions for purposes of reporting, separate data for each agency must be maintained either by the agency itself or by the office of the political jurisdiction responsible for preparing the EEO-4 form. It is the responsibility of every political jurisdiction to obtain from the Commission or its delegate necessary instructions in order to comply with the requirements of this section.

(Approved by the Office of Management and Budget under control number 3046-0008)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[38 FR 12604, May 14, 1973, as amended at 39 FR 30832, Aug 26, 1974; 46 FR 63268, Dec. 31, 1981]

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[1] NOTE: Instructions were published as an appendix to the proposed regulations on Mar. 2, 1973 (38 FR 5662).

§ 1602.31 Preservation of records made or kept.

(a) Any personnel or employment record made or kept by a political jurisdiction (including but not necessarily limited to application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff, or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the political jurisdiction for a period of 2 years from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of 2 years from the date of termination. Where a charge of discrimination has been filed, or an action brought by the Attorney General against a political jurisdiction under title VII, the respondent political jurisdiction shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action. The term "personnel record relevant to the charge," for example, would include personnel or employment records relating to the person claiming to be aggrieved and to all other employees holding positions similar to that held or sought by the person claiming to be aggrieved; and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the person claiming to be aggrieved applied and was rejected. The date of final disposition of the charge or the action means the date of expiration of the statutory period within which a person claiming to be aggrieved may bring an action in a U.S. district court or, where an action is brought against a political jurisdiction either by a person claiming to be aggrieved or by the Attorney General, the date on which such litigation is terminated.

(b) The requirements of this section shall not apply to application forms and other preemployment records of applicants for positions known to applicants to be of a temporary or seasonal nature.

(Approved by the Office of Management and Budget under control number 3046-0008)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[38 FR 12605, May 14, 1973, as amended by 46 FR 63268, Dec. 31, 1981]

Subpart J—State and Local Government Information Report

SOURCE: 38 FR 12605, May 14, 1973, unless otherwise noted.

§ 1602.32 Requirement for filing and preserving copy of report.

(a) On or before September 30, 1974 and annually thereafter, certain political jurisdictions subject to title VII of the Civil Rights Act of 1964, as amended, shall file with the Commission or its delegate executed copies of "State and Local Government Information Report EEO-4" in conformity with the directions set forth in the form and accompanying instructions. The political jurisdictions covered by this regulation are (1) those which have 100 or more employees, and (2) those other political jurisdictions which have 15 or more employees from whom the Commission requests the filing of reports. Every such political jurisdiction shall retain at all times a copy of the most recently filed EEO-4 at the central office of the political jurisdiction for a period of 3 years and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of title VII, as amended.

(b) For calendar year 1973, the requirements of paragraph (a) of this section shall be carried out on or before October 31, 1973.

[38 FR 12605, May 14, 1973, as amended at 39 FR 30832, Aug. 26, 1974]

§ 1602.33 Penalty for making of willfully false statements on report.

The making of willfully false statements on report EEO-4, is a violation of the United States Code, Title 18, section 1001, and is punishable by fine or imprisonment as set forth therein.

§ 1602.34 Commission's remedy for political jurisdiction's failure to file report.

Any political jurisdiction failing or refusing to file report EEO-4 when required to do so may be compelled to file by order of a U.S. district court, upon application of the Attorney General.

§ 1602.35 Political jurisdiction's exemption from reporting requirements.

If it is claimed that the preparation or filing of the report would create undue hardship, the political jurisdiction may apply to the Commission for an exemption from the requirements set forth in this part by submitting to the Commission or its delegate a specific proposal for an alternative reporting system prior to the date on which the report is due.

§ 1602.36 Schools exemption.

The recordkeeping and report-filing requirements of Subparts I and J of this part shall not apply to State or local educational institutions or to school districts or school systems or any other educational functions. The previous sentence of this section shall not act to bar jurisdiction which otherwise would attach under § 1602.30.

§ 1602.37 Additional reporting requirements.

The Commission reserves the right to require reports, other than that designated as the "State and Local Government Information Report EEO-4," about the employment practices of individual political jurisdictions or group of political jurisdictions whenever, in its judgment, special or supplemental reports are necessary to accomplish the purposes of title VII. Any system for the requirement of such reports will be established in accordance with the procedures referred to in section 709(c) of title VII and as otherwise prescribed by law.

Subpart K—Records and Inquiries as to Race, Color, National Origin, or Sex

§ 1602.38 Applicability of State or local law.

The requirements imposed by the Equal Employment Opportunity Commission in these regulations, Subparts I and J, supersede any provisions of State or local law which may conflict with them.

[38 FR 12605, May 14, 1973]

Subpart L—Elementary and Secondary School Systems, Districts, and Individual Schools Recordkeeping

§ 1602.39 Records to be made or kept.

On or before November 30, 1974, and annually thereafter, every public elementary and secondary school system or district, including every individually or separately administered district within a system, with 15 or more employees and every individual school within such system or district, regardless of the size of the school shall make or keep all records and information therefrom which are or would be necessary for the completion of report EEO-5 whether or not it is required to file such a report under § 1602 41. The instructions for completion of report EEO-5 are specifically incorporated herein by reference and have the same force and effect as other sections of this part.[1] Such records and the information therefrom shall be retained at all times for a period of 3 years at the central office of the elementary or secondary school system or district, or at the individual school which is the subject of the records and the information therefrom, where more convenient, and shall be made available if requested by an officer, agent, or employee of the Commission under sec. 710 of Title VII, as amended. It is the responsibility of every such school system or district, to obtain from the Commission or its delegate necessary

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[1] NOTE: Instructions were published as an appendix to the proposed regulations on June 12, 1973 (38 FR 15463).

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instructions in order to comply with the requirements of this section.

(Approved by the Office of Management and Budget under control number 3046-0003)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[38 FR 26719, Sept. 25, 1973, as amended at 39 FR 30832, Aug. 26, 1974; 46 FR 63268, Dec. 31, 1981]

§ 1602.40 Preservation of records made or kept.

(a) Any personnel or employment record made or kept by a school system, district, or individual school (including but not necessarily limited to application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff, or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by such school system, district, or school, as the case may be, for a period of 2 years from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of 2 years from the date of termination. Where a charge of discrimination has been filed, or an action brought against an elementary or secondary school by the Commission or the Attorney General, the respondent elementary or secondary school system, district, or individual school shall preserve similarly at the central office of the system or district or individual school which is the subject of the charge or action, where more convenient, all personnel records relevant to the charge or action until final disposition thereof. The term "personnel record relevant to the charge," for example, would include personnel or employment records relating to the person claiming to be aggrieved and to all other employees holding positions similar to that held or sought by the person claiming to be aggrieved; and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the person claiming to be aggrieved applied and was rejected. The date of "final disposition of the charge or the action" means the date of expiration of the statutory period within which a person claiming to be aggrieved may bring an action in a U.S. district court or, where an action is brought against a school system, district, or school either by a person claiming to be aggrieved, the Commission, or the Attorney General, the date on which such litigation is terminated.

(b) The requirements of this section shall not apply to application forms and other preemployment records of applicants for positions known to applicants to be a temporary or seasonal nature.

(Approved by the Office of Management and Budget under control number 3046-0003)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[38 FR 26719, Sept. 25, 1973, as amended by 46 FR 63268, Dec. 31, 1981]

Subpart M—Elementary-Secondary Staff Information Report

SOURCE: 38 FR 26719, Sept. 25, 1973, unless otherwise noted.

§ 1602.41 Requirement for filing and preserving copy of report.

On or before November 30, 1982, and biennially thereafter, certain public elementary and secondary school systems and districts, including individually or separately administered districts within such systems, and individual schools within such systems or district shall file with the Commission or its delegate executed copies of Elementary-Secondary Staff Information Report EEO-5 in conformity with the directions set forth in the form and accompanying instructions. The elementary and secondary school systems and districts covered are: (a) Every one of those which have 100 or more employees, and (b) every one of those others which have 15 or more employees from whom the Commission requests the filing of reports. Every such elementary or secondary school system or district shall retain at all times, for a period of 3 years, a copy of the most recently filed report EEO-5 at the central office of the school system or district, or the individual school which is the subject of the report, where more convenient, and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of Title VII, as amended. It is the responsibility of the school systems or districts above described in this section to obtain from the Commission or its delegate necessary supplies of the form.

[48 FR 8058, Feb. 25, 1983]

§ 1602.42 Penalty for making of willfully false statements on report.

The making of willfully false statements on report EEO-5 is a violation of the United States Code, Title 18, section 1001, and is punishable by fine or emprisonment as set forth therein.

§ 1602.43 Commission's remedy for school systems', districts' or individual schools' failure to file report.

Any school system, district, or individual school failing or refusing to file report EEO-5 when required to do so may be compelled to file by order of a U.S. district court, upon application of the Commission or the Attorney General.

§ 1602.44 School systems', districts', or individual schools' exemption from reporting requirements.

If it is claimed that the preparation or filing of the report would create undue hardship, the school system, district, or individual school may apply to the Commission for an exemption from the requirements set forth in this part by submitting to the Commission or its delegate a specific proposal for an alternative reporting system prior to the date on which the report is due.

§ 1602.45 Additional reporting requirements.

The Commission reserves the right to require reports, other than that designated as the Elementary-Secondary Information Report EEO-5, about the employment practices of private or public individual school systems, districts, or schools, or groups thereof, whenever, in its judgment, special or supplemental reports are necessary to accomplish the purposes of title VII. Any system for the requirement of such reports will be established in accordance with the procedures referred to in section 709(c) of title VII and as otherwise prescribed by law.

Subpart N—Records and Inquiries as to Race, Color, National Origin, or Sex

§ 1602.46 Applicability of State or local law.

The requirements imposed by the Equal Employment Opportunity Commission in these regulations, Subparts L and M of this part, supersede any provisions of State or local law which may conflict with them.

(Sec. 709(c), 78 Stat. 265, 42 U.S.C. 2000e-8(c), 29 CFR 1602.3)

[38 FR 23720, Sept. 25, 1973]

Subpart O—Recordkeeping for Institutions of Higher Education

SOURCE: 40 FR 25188, June 12, 1975, unless otherwise noted.

§ 1602.47 Definition.

Under Subparts O and P of this part, the term "institution of higher education" means an institutional system, college, university, community college, junior college, and any other educational institution which offers an associate degree, baccalaureate degree or higher degree or which offers a two year program of college level studies without degree. The term "college level studies" means a post secondary program which is wholly or principally creditable toward a baccalaureate degree or terminates in an associate degree.

§ 1602.48 Records to be made or kept.

Commencing August 1, 1975, every institution of higher education, whether public or private, with 15 or more employees, shall make or keep all records, and information therefrom, which are or would be necessary for the completion of Higher Education Staff Information Report EEO-6 whether or not it is required to file such a report under § 1602.50. The instructions for completion of Report EEO-6 are specifically incorporated herein by reference and have the same force and effect as other sections of this part.[1] Such records, and the information therefrom, shall be retained at all times for a period of three years at the central administrative office of the institution of higher education, at the central administrative office of a separate campus or branch, or at an individual school which is the subject of the records and information, where more convenient. Such records, and the information therefrom, shall be made available if requested by the Commission or its representative under section 710 of Title VII and 29 U.S.C. 161. It is the responsibility of every institution of higher education to obtain from the Commission or its delegate the necessary instructions in order to comply with the requirements of this section.

(Approved by the Office of Management and Budget under control number 3046-0009)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[40 FR 25188, June 12, 1975, as amended at 46 FR 63268, Dec. 31, 1981]

§ 1602.49 Preservation of records made or kept.

(a) Any personnel or employment record (including but not necessarily limited to application forms submitted by applicants and other records having to do with hiring, promotion, tenure, demotion, transfer, layoff, or termination, rates of pay or other terms of compensation, and selection for training) made or kept by an institution of higher education shall be preserved by such institution of higher education for a period of two years from the date of the making of the personnel action or record involved, whichever occurs later. In the case of the involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of two years from the date of termination. Where a charge of discrimination has been filed, or a civil action brought against an institution of higher education by the Commission or the Attorney General, the respondent shall preserve similarly at the central administrative office of the institution of higher education, at the central office of a separate campus or branch, or at the individual school which is the subject of the charge or action, where more convenient, all personnel records relevant to the charge or action until final disposition thereof. The term "personnel records relevant to the charge," for example, would include personnel or employment records relating to the person claiming to be aggrieved and to all other employees holding positions similar to that held or sought by the person claiming to be aggrieved; it would also include application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the person claiming to be aggrieved applied and was rejected. The date of "final disposition of the charge or the action" means the date of expiration of the statutory period within which a person claiming to be aggrieved may bring an action in the United States District Court, or, where an action is brought against an institution of higher education by a person claiming to be aggrieved, the Commission, or the Attorney General, the date on which such litigation is terminated.

(b) The requirements of paragraph (a) of this section shall not apply to under-graduate students of an institution of higher education who are employed part-time or temporarily by the institution of higher education or by a student organization sponsored by the institution of higher education. Nor shall the requirements of paragraph (a) of this section apply to graduate students who are working part-time or temporarily in non-faculty positions for the institution of higher education or for a student organization sponsored by the institution of higher education or are working part-time in faculty positions in which work assignments are primarily for fulfilling the requirements of a degree more advanced than a bachelor's degree.

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[1] NOTE: Instructions were published as an appendix to the regulations at 40 FR 25188, June 12, 1975.

(c) The requirements of paragraph (a) of this section shall not apply to application forms and other preemployment records of non-student applicants for positions known to non-student applicants to be of a temporary or seasonal nature.

(Approved by the Office of Management and Budget under control number 3046-0009)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[40 FR 25188, June 12, 1975, as amended at 46 FR 63268, Dec. 31, 1981]

Subpart P—Higher Education Staff Information Report EEO-6

SOURCE: 40 FR 25189, June 12, 1975, unless otherwise noted.

§ 1602.50 Requirement for filing and preserving copy of report.

On or before November 30, 1975, and biennially thereafter, every public and private institution of higher education having fifteen (15) or more employees shall file with the Commission or its delegate executed copies of Higher Education Staff Information Report EEO-6 in conformity with the directions set forth in the form and accompanying instructions. Every institution of higher education shall retain at all times, for a period of three years a copy of the most recently filed Report EEO-6 at its central administrative office, at the central office of a separate campus or branch, or at an individual school which is the subject of the report, where more convenient. An institution of higher education shall make the same available if requested by the Commission or is representative under the authority of section 710 of the Act and 29 U.S.C. 161. It is the responsibility of the institutions above described in this section to obtain from the Commission or its delegate necessary supplies of the form.

§ 1602.51 Penalty for making of willfully false statements on report.

The making of willfully false statements on Report EEO-6 is a violation of the United States Code, Title 18, section 1001, and is punishable by fine or imprisonment as set forth therein.

§ 1602.52 Commission's remedy for failure to file.

Any institution of higher education failing or refusing to keep records, in accordance with §§ 1602.48 or 1602.49 of Subpart O of this part, or failing or refusing to file Report EEO-6 when required to do so, in accordance with § 1602.50 of this part, may be compelled to keep records or to file by order of a United States District Court upon application of the Commission, or the Attorney General in a case involving a public institution.

§ 1602.53 Exemption from reporting requirements.

If it is claimed that the preparation or filing of the report would create undue hardship, the institution of higher education may apply to the Commission for an exemption from the requirements set forth in Subparts O and P of this part by submitting to the Commission or its delegate a specific proposal for an alternative reporting system no later than 45 days prior to the date on which the report must be filed.

§ 1602.54 Additional reporting requirements.

The Commission reserves the right to require reports, other than that designated as the Higher Education Staff Information Report EEO-6, about the employment practices of private or public institutions of higher education whenever, in its judgment, special or supplemental reports are necessary to accomplish the purposes of title VII. Any system for the requirement of such reports will be established in accordance with the procedures referred to in section 709(c) of title VII and as otherwise prescribed by law.

Subpart Q—Records and Inquiries as to Race, Color, National Origin, or Sex

§ 1602.55 Applicability of State or local law.

The requirements imposed by the Equal Employment Opportunity Commission in these regulations, Subparts O, P, and Q of this part, supersede any provisions of State or local law which may conflict with them.

[40 FR 25189, June 12, 1975]

PART 1604—GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

Sec.

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APPENDIX—QUESTIONS AND ANSWERS ON THE PREGNANCY DISCRIMINATION ACT, PUB. L. 95-555, 92 STAT. 2076 (1978)

AUTHORITY: Sec. 713(b), 78 Stat. 265, 42 U.S.C. 2000e-12.

SOURCE: 37 FR 6836, April 5, 1972, unless otherwise noted.

§ 1604.1 General principles.

(a) References to "employer" or "employers" in this Part 1604 state principles that are applicable not only to employers but also to labor organizations and to employment agencies insofar as their action or inaction may adversely affect employment opportunities.

(b) To the extent that the views expressed in prior Commission pronouncements are inconsistent with the views expressed herein, such prior views are hereby overruled.

(c) The Commission will continue to consider particular problems relating to sex discrimination on a case-by-case basis.

§ 1604.2 Sex as a bona fide occupational qualification.

(a) The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Label—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment: that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section.

(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

(b) Effect of sex-oriented State employment legislation.

(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified

number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(2) The Commission has concluded that State laws and regulations which discriminate on the basis of sex with regard to the employment of minors are in conflict with and are superseded by title VII to the extent that such laws are more restrictive for one sex. Accordingly, restrictions on the employment of minors of one sex over and above those imposed on minors of the other sex will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(3) A number of States require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by State law; or

(ii) It does not provide the same benefits for male employees.

(4) As to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of title VII. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the provision of such benefits; or

(ii) It does not provide the same benefits for male employees. If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by title VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex.

(5) Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex.

§ 1604.3 Separate lines of progression and seniority systems.

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male," or for a job in a "male" line of progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

(b) A Seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

§ 1604.4 Discrimination against married women.

(a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

(b) It may be that under certain circumstances, such a rule could be justified within the meaning of section 703(e)(1) of title VII. We express no opinion on this question at this time except to point out that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work.

§ 1604.5 Job opportunities advertising.

It is a violation of title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed "Male" or "Female," will be considered an expression of a preference, limitation, specification, or discrimination based on sex.

§ 1604.6 Employment agencies.

(a) Section 703(b) of the Civil Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. The Commission has determined that private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

(b) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupations qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

(c) It is the responsibility of employment agencies to keep informed of opinions and decisions of the Commission on sex discrimination.

§ 1604.7 Pre-employment inquiries as to sex.

A pre-employment inquiry may ask "Male........., Female........."; or "Mr. Mrs. Miss," provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

§ 1604.8 Relationship of title VII to the Equal Pay Act.

(a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

§ 1604.9 Fringe benefits.

(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(c) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of the household" or "principal wage earner" in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discrimination contained in the act.

(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

(e) It shall not be a defense under title VIII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. A statement of the General Counsel of September 13, 1968, providing for a phasing out of differentials with regard to optional retirement age for certain incumbent employees is hereby withdrawn.

§ 1604.10 Employment policies relating to pregnancy and childbirth.

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

(d)(1) Any fringe benefit program, or fund, or insurance program which is in effect on October 31, 1978, which does not treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected but similar in their ability or inability to work, must be in compliance with the provisions of § 1604.10(b) by April 29, 1979. In order to come into compliance with the provisions of 1604.10(b), there can be no reduction of benefits or compensation which were in effect on October 31, 1978, before October 31, 1979 or the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

(2) Any fringe benefit program implemented after October 31, 1978, must comply with the provisions of § 1604.10(b) upon implementation.

[44 FR 23805, Apr. 20, 1979]

§ 1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.[1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job junctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for

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[1] The principles involved here continue to apply to race, color, religion or national origin.

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but denied that employment opportunity or benefit.

(Title VII, Pub. L. 88-352, 78 Stat. 253 (42 U.S.C. 2000e et seq.))

[45 FR 74677, Nov. 10, 1980]

Appendix—Questions and Answers on the Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076 (1978)

Introduction

On October 31, 1978, President Carter signed into law the *Pregnancy Discrimination Act* (Pub. L. 95-955). The Act is an amendment to Title VII of the Civil Rights Act of 1964 which prohibits, among other things, discrimination in employment on the basis of sex. The *Pregnancy Discrimination Act* makes it clear that "because of sex" or "on the basis of sex", as used in Title VII, includes "because of or on the basis of pregnancy, childbirth or related medical conditions." Therefore, Title VII prohibits discrimination in employment against women affected by pregnancy or related conditions.

The basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion. She usually cannot be forced to go on leave as long as she can still work. If other employees who take disability leave are entitled to get their jobs back when they are able to work again, so are women who have been unable to work because of pregnancy.

In the area of fringe benefits, such as disability benefits, sick leave and health insurance, the same principle applies. A woman unable to work for pregnancy-related reasons is entitled to disability benefits or sick leave on the same basis as employees unable to work for other medical reasons. Also, any health insurance provided must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions. However, health insurance for expenses arising from abortion is not required except where the life of the mother would be endangered if the fetus were carried to term, or where medical complications have arisen from an abortion.

Some questions and answers about the *Pregnancy Discrimination Act* follow. Although the questions and answers often use only the term "employer," the Act—and these questions and answers—apply also to unions and other entities covered by Title VII.

1. Q. What is the effective date of the Pregnancy Discrimination Act?

A. The Act became effective on October 31, 1978, except that with respect to fringe benefit programs in effect on that date, the Act will take effect 180 days thereafter, that is, April 29, 1979.

To the extent that Title VII already required employers to treat persons affected by pregnancy-related conditions the same as persons affected by other medical conditions, the Act does not change employee rights arising prior to October 31, 1978, or April 29, 1979. Most employment practices relating to pregnancy, childbirth and related conditions—whether concerning fringe benefits or other practices—were already controlled by Title VII prior to this Act. For example, Title VII has always prohibited an employer from firing, or refusing to hire or promote, a woman because of pregnancy or related conditions, and from failing to accord a woman on pregnancy-related leave the same seniority retention and accrual accorded those on other disability leaves.

2. Q. If an employer had a sick leave policy in effect on October 31, 1978, by what date must the employer bring its policy into compliance with the Act?

A. With respect to payment of benefits, an employer has until April 29, 1979, to bring into compliance any fringe benefit or insurance program, including a sick leave policy, which was in effect on October 31, 1978. However, any such policy or program created after October 31, 1978, must be in compliance when created.

With respect to all aspects of sick leave policy other than payment of benefits, such as the terms governing retention and accrual of seniority, credit for vacation, and resumption of former job on return from sick leave, equality of treatment was required by Title VII without the Amendment.

3. Q. Must an employer provide benefits for pregnancy-related conditions to an employee whose pregnancy begins prior to April 29, 1979, and continues beyond that date?

A. As of April 29, 1979, the effective date of the Act's requirements, an employer must provide the same benefits for pregnancy-related conditions as it provides for other conditions, regardless of when the pregnancy began. Thus, disability benefits must be paid for all absences on or after April 29, 1979, resulting from pregnancy-related temporary disabilities to the same extent as they are paid for absences resulting from other temporary disabilities. For example, if an employee gives birth before April 29, 1979, but is still unable to work on or after that date, she is entitled to the same disability benefits available to other employees. Similarily, medical insurance benefits must be paid for pregnancy-related expenses incurred on or after April 29, 1979.

If an employer requires an employee to be employed for a predetermined period prior to being eligible for insurance coverage, the period prior to April 29, 1979, during which a pregnant employee has been employed must be credited toward the eligibility waiting period on the same basis as for any other employee.

As to any programs instituted for the first time after October 31, 1978, coverage for pregnancy-related conditions must be provided in the same manner as for other medical conditions.

4. Q. Would the answer to the preceding question be the same if the employee became pregnant prior to October 31, 1978?

A. Yes.

5. Q. If, for pregnancy-related reasons, an employee is unable to perform the functions of her job, does the employer have to provide her an alternative job?

A. An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc. For example, a woman's primary job function may be the operation of a machine, and, incidental to that function, she may carry materials to and from the machine. If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.

6. Q. What procedures may an employer use to determine whether to place on leave as unable to work a pregnant employee who claims she is able to work or deny leave to a pregnant employee who claims that she is disabled from work?

A. An employer may not single out pregnancy-related conditions for special procedures for determining an employee's ability to work. However, an employer may use any procedure used to determine the ability of all employees to work. For example, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statement. Similarly, if an employer allows its employees to obtain doctor's statements from their personal physicians for absences due to other disabilities or return dates from other disabilities, it must accept doctor's statements from personal physicians for absences and return dates connected with pregnancy-related disabilities.

7. Q. Can an employer have a rule which prohibits an employee from returning to work for a predetermined length of time after childbirth?

A. No.

8. Q. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, may her employer require her to remain on leave until after her baby is born?

A. No. An employee must be permitted to work at all times during pregnancy when she is able to perform her job.

9. Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?

A. Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons.

10. Q. May an employer's policy concerning the accrual and crediting of seniority during absences for medical conditions be different for employees affected by pregnancy-related conditions than for other employees?

A. No. An employer's seniority policy must be the same for employees absent for pregnancy-related reasons as for those absent for other medical reasons.

11. Q. For purposes of calculating such matters as vacations and pay increases, may an employer credit time spent on leave for pregnancy-related reasons differently than time spent on leave for other reasons?

A. No. An employer's policy with respect to crediting time for the purpose of calculating such matters as vacations and pay increases cannot treat employees on leave for pregnancy-related reasons less favorably than employees on leave for other reasons. For example, if employees on leave for medical reasons are credited with the time spent on leave when computing entitlement to vacation or pay raises, an employee on leave for pregnancy-related disability is entitled to the same kind of time credit.

12. Q. Must an employer hire a woman who is medically unable, because of a pregnancy-related condition, to perform a necessary function of a job?

A. An employer cannot refuse to hire a women because of her pregnancy-related condition so long as she is able to perform the major functions necessary to the job. Nor can an employer refuse to hire her because of its preferences against pregnant workers or the preferences of co-workers, clients, or customers.

13. Q. May an employer limit disability benefits for pregnancy-related conditions to married employees?

A. No.

14. Q. If an employer has an all female workforce or job classification, must bene-

fits be provided for pregnancy-related conditions?

A. Yes. If benefits are provided for other conditions, they must also be provided for pregnancy-related conditions.

15. Q. For what length of time must an employer who provides income maintenance benefits for temporary disabilities provide such benefits for pregnancy-related disabilities?

A. Benefits should be provided for as long as the employee is unable to work for medical reasons unless some other limitation is set for all other temporary disabilities, in which case pregnancy-related disabilities should be treated the same as other temporary disabilities.

16. Q. Must an employer who provides benefits for long-term or permanent disabilities provide such benefits for pregnancy-related conditions?

A. Yes. Benefits for long-term or permanent disabilities resulting from pregnancy-related conditions must be provided to the same extent that such benefits are provided for other conditions which result in long-term or permanent disability.

17. Q. If an employer provides benefits to employees on leave, such as installment purchase disability insurance, payment of premiums for health, life or other insurance, continued payments into pension, saving or profit sharing plans, must the same benefits be provided for those on leave for pregnancy-related conditions?

A. Yes, the employer must provide the same benefits for those on leave for pregnancy-related conditions as for those on leave for other reasons.

18. Q. Can an employee who is absent due to a pregnancy-related disability be required to exhaust vacation benefits before receiving sick leave pay or disability benefits?

A. No. If employees who are absent because of other disabling causes receive sick leave pay or disability benefits without any requirement that they first exhaust vacation benefits the employer cannot impose this requirement on an employee absent for a pregnancy-related cause.

18(A). Q. Must an employer grant leave to a female employee for childcare purposes after she is medically able to return to work following leave necessitated by pregnancy, childbirth or related medical conditions?

A. While leave for childcare purposes is not covered by the Pregnancy Discrimination Act, ordinary Title VII principles would require that leave for childcare purposes be granted on the same basis as leave which is granted to employees for other non-medical reasons. For example, if an employer allows its employees to take leave without pay or accrued annual leave for travel or education which is not job related, the same type of leave must be granted to those who wish to remain on leave for infant care, even though they are medically able to return to work.

19. Q. If state law requires an employer to provide disability insurance for a specified period before and after childbirth, does compliance with the state law fulfill the employer's obligation under the Pregnancy Discrimination Act?

A. Not necessarily. It is an employer's obligation to treat employees temporarily disabled by pregnancy in the same manner as employees affected by other temporary disabilities. Therefore, any restrictions imposed by state law on benefits for pregnancy-related disabilities, but not for other disabilities, do not excuse the employer from treating the individuals in both groups of employees the same. If, for example, a state law requires an employer to pay a maximum of 26 weeks benefits for disabilities other than pregnancy-related ones but only six weeks for pregnancy-related disabilities, the employer must provide benefits for the additional weeks to an employee disabled by pregnancy-related conditions, up to the maximum provided other disabled employees.

20. Q. If a State or local government provides its own employees income maintenance benefits for disabilities, may it provide different benefits for disabilities arising from pregnancy-related conditions than for disabilities arising from other conditions?

A. No. State and local governments, as employers, are subject to the Pregnancy Discrimination Act in the same way as private employers and must bring their employment practices and programs into compliance with the Act, including disability and health insurance programs.

21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.

But the insurance does not have to cover the pregnancy-related conditions of other dependents as long as it excludes the pregnancy-related conditions of the dependents of male and female employees equally.

22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level.

23. Q. May an employer offer optional dependent coverage which excludes pregnancy-related medical conditions or offers less coverage for pregnancy-related medical conditions where the total premium for the optional coverage is paid by the employee?

A. No. Pregnancy-related medical conditions must be treated the same as other medical conditions under any health or disability insurance or sick leave plan *available in connection with employment*, regardless of who pays the premiums.

24. Q. Where an employer provides its employees a choice among several health insurance plans, must coverage for pregnancy-related conditions be offered in all of the plans?

A. Yes. Each of the plans must cover pregnancy-related conditions. For example, an employee with a single coverage policy cannot be forced to purchase a more expensive family coverage policy in order to receive coverage for her own pregnancy-related condition.

25. Q. On what basis should an employee be reimbursed for medical expenses arising from pregnancy, childbirth or related conditions?

A. Pregnancy-related expenses should be reimbursed in the same manner as are expenses incurred for other medical conditions. Therefore, whether a plan reimburses the employees on a fixed basis, or a percentage of reasonable and customary charge basis, the same basis should be used for reimbursement of expenses incurred for pregnancy-related conditions. Furthermore, if medical costs for pregnancy-related conditions increase, reevaluation of the reimbursement level should be conducted in the same manner as are cost reevaluations of increases for other medical conditions.

Coverage provided by a health insurance program for other conditions must be provided for pregnancy-related conditions. For example, if a plan provides major medical coverage, pregnancy-related conditions must be so covered. Similarily, if a plan covers the cost of a private room for other conditions, the plan must cover the cost of a private room for pregnancy-related conditions. Finally, where a health insurance plan covers office visits to physicians, pre-natal and post-natal visits must be included in such coverage.

26. Q. May an employer limit payment of costs for pregnancy-related medical conditions to a specified dollar amount set forth in an insurance policy, collective bargaining agreement or other statement of benefits to which an employee is entitled?

A. The amounts payable for the costs incurred for pregnancy-related conditions can be limited only to the same extent as are costs for other conditions. Maximum recoverable dollar amounts may be specified for pregnancy-related conditions if such amounts are similarly specified for other conditions, and so long as the specified amounts in all instances cover the same proportion of actual costs. If, in addition to the scheduled amount for other procedures, additional costs are paid for, either directly or indirectly, by the employer, such additional payments must also be paid for pregnancy-relate procedures.

27. Q. May an employer impose a different deductible for payment of costs for pregnancy-related medical conditions than for costs of other medical conditions?

A. No. Neither an additional deductible, an increase in the usual deductible, nor a larger deductible can be imposed for coverage for pregnancy-related medical costs, whether as a condition for inclusion of pregnancy-related costs in the policy or for payment of the costs when incurred. Thus, if pregnancy-related costs are the first incurred under the policy, the employee is required to pay only the same deductible as would otherwise be required had other medical costs been the first incurred. Once this deductible has been paid, no additional deductible can be required for other medical procedures. If the usual deductible has already been paid for other medical procedures, no additional deductible can be required when pregnancy-related costs are later incurred.

28. Q. If a health insurance plan excludes the payment of benefits for any conditions existing at the time the insured's coverage becomes effective (pre-existing condition clause), can benefits be denied for medical costs arising from a pregnancy existing at the time the coverage became effective?

A. Yes. However, such benefits cannot be denied unless the pre-existing condition clause also excludes benefits for other pre-existing conditions in the same way.

29. Q. If an employer's insurance plan provides benefits after the insured's employment has ended (i.e. extended benefits) for costs connected with pregnancy and delivery where conception occurred while the in-

sured was working for the employer, but not for the costs of any other medical condition which began prior to termination of employment, may an employer (a) continue to pay these extended benefits for pregnancy-related medical conditions but not for other medical conditions, or (b) terminate these benefits for pregnancy-related conditions?

A. Where a health insurance plan currently provides extended benefits for other medical conditions on a less favorable basis than for pregnancy-related medical conditions, extended benefits must be provided for other medical conditions on the same basis as for pregnancy-related medical conditions. Therefore, an employer can neither continue to provide less benefits for other medical conditions nor reduce benefits currently paid for pregnancy-related medical conditions.

30. Q. Where an employer's health insurance plan currently requires total disability as a prerequisite for payment of extended benefits for other medical conditions but not for pregnancy-related costs, may the employer now require total disability for payment of benefits for pregnancy-related medical conditions as well?

A. Since extended benefits cannot be reduced in order to come into compliance with the Act, a more stringent prerequisite for payment of extended benefits for pregnancy-related medical conditions, such as a requirement for total disability, cannot be imposed. Thus, in this instance, in order to comply with the Act, the employer must treat other medical conditions as pregnancy-related conditions are treated.

31. Q. Can the added cost of bringing benefit plans into compliance with the Act be apportioned between the employer and employee?

A. The added cost, if any, can be apportioned between the employer and employee in the same proportion that the cost of the fringe benefit plan was apportioned on October 31, 1978, if that apportionment was nondiscriminatory. If the costs were not apportioned on October 31, 1978, they may not be apportioned in order to come into compliance with the Act. However, in no circumstance may male or female employees be required to pay unequal apportionments on the basis of sex or pregnancy.

32. Q. In order to come into compliance with the Act, may an employer reduce benefits or compensation?

A. In order to come into compliance with the Act, benefits or compensation which an employer was paying on October 31, 1978 cannot be reduced before October 31, 1979 or before the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

Where an employer has not been in compliance with the Act by the times specified in the Act, and attempts to reduce benefits, or compensation, the employer may be required to remedy its practices in accord with ordinary Title VII remedial principles.

33. Q. Can an employer self-insure benefits for pregnancy-related conditions if it does not self-insure benefits for other medical conditions?

A. Yes, so long as the benefits are the same. In measuring whether benefits are the same, factors other than the dollar coverage paid should be considered. Such factors include the range of choice of physicians and hospitals, and the processing and promptness of payment of claims.

34. Q. Can an employer discharge, refuse to hire or otherwise discriminate against a woman because she has had an abortion?

A. No. An employer cannot discriminate in its employment practices against a woman who has had an abortion.

35. Q. Is an employer required to provide fringe benefits for abortions if fringe benefits are provided for other medical conditions?

A. All fringe benefits other than health insurance, such as sick leave, which are provided for other medical conditions, must be provided for abortions. Health insurance, however, need be provided for abortions only where the life of the woman would be endangered if the fetus were carried to term or where medical complications arise from an abortion.

36. Q. If complications arise during the course of an abortion, as for instance excessive hemorrhaging, must an employer's health insurance plan cover the additional cost due to the complications of the abortion?

A. Yes. The plan is required to pay those additional costs attributable to the complications of the abortion. However, the employer is not required to pay for the abortion itself, except where the life of the mother would be endangered if the fetus were carried to term.

37. Q. May an employer elect to provide insurance coverage for abortions?

A. Yes. The Act specifically provides that an employer is not precluded from providing benefits for abortions whether directly or through a collective bargaining agreement, but if an employer decides to cover the costs of abortion, the employer must do so in the same manner and to the same degree as it covers other medical conditions.

[44 FR 23805, Apr. 20, 1979]

PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

Sec.

1605.1 "Religious" nature of a practice or belief.
1605.2 Reasonable accommodation without undue hardship as required by Section 701(j) of Title VII of the Civil Rights Act of 1964.
1605.3 Selection practices.
APPENDIX A TO §§ 1605.2 AND 1605.3—BACKGROUND INFORMATION

AUTHORITY: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

SOURCE: 45 FR 72612, Oct. 31, 1980, unless otherwise noted.

§ 1605.1 "Religious" nature of a practice or belief.

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States* v. *Seeger,* 380 U.S. 163 (1965) and *Welsh* v. *United States,* 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions.[1] The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in Section 701(j), 42 U.S.C. 2000e(j).

§ 1605.2 Reasonable accommodation without undue hardship as required by Section 701(j) of Title VII of the Civil Rights Act of 1964.

(a) *Purpose of this section.* This section clarifies the obligation imposed by Title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under Title VII not to discriminate on grounds of religion, nor other provisions of Title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as section 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by Title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) *Duty to accommodate.* (1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.[2]

(2) Section 701(j) in conjunction with section 703(c), imposes an obligation on a labor organization to reasonably accommodate the religious practices of an employee or prospective employee, unless the labor organization demonstrates that accommodation would result in undue hardship.

(3) Section 1605.2 is primarily directed to obligations of employers or labor organizations, which are the entities covered by Title VII that will most often be required to make an accommodation. However, the principles of § 1605.2 also apply when an accommodation can be required of other entities covered by Title VII, such as employment agencies (Section 703(b)) or joint labor-management committees controlling appreticeship or other

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[1] See CD 76-104 (1976), CCH ¶6500; CD 71-2620 (1971), CCH ¶6283; CD 71-779 (1970), CCH ¶6180.

[2] See *Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. 63, 74 (1977).

training or retraining (Section 703(d)). (See, for example, § 1605.3(a) "Scheduling of Tests or Other Selection Procedures.")

(c) *Reasonable accommodation.* (1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunites, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) *Alternatives for accommodating religious practices.* (1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in Appendix A to §§ 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) Voluntary Substitutes and "Swaps".

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.[3]

(iii) Lateral Transfer and Change of Job Assignments.

When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) Payment of Dues to a Labor Organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices to not permit compliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

(e) *Undue hardship.* (1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a *de minimis* cost".[4] The Commission will determine what constitutes "more than a *de minimis* cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. *Hardison, supra,* 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

§ 1605.3 Selection practices.

(a) Scheduling of Tests or Other Selection Procedures. When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

(b) Inquiries Which Determine An Applicant's Availability to Work During An Employer's Scheduled Working Hours.

(1) The duty to accommodate pertains to prospective employees as well as current employees. Consequently,

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[3] On September 29, 1978, Congress enacted such a provision for the accommodation of Federal employees' religious practices. See Pub. L 95-390, 5 U.S.C. 5550a "Compensatory Time Off for Religious Observances."

[4] *Hardison, supra,* 432 U.S. at 84.

an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on these Guidelines as proposed, the Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate Title VII unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or

(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification; and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

Appendix A to §§ 1605.2 and 1605.3—Background Information

In 1966, the Commission adopted guidelines on religious discrimination which stated that an employer had an obligation to accommodate the religious practices of its employees or prospective employees unless to do so would create a "serious inconvenience to the conduct of the business". 29 CFR 1605.1(a)(2), 31 FR 3870 (1966).

In 1967, the Commission revised these guidelines to state that an employer had an obligation to reasonably accommodate the religious practices of its employees or prospective employees, unless the employer could prove that to do so would create an "undue hardship". 29 CFR 1605.1(b)(c), 32 FR 10298.

In 1972, Congress amended Title VII to incorporate the obligation to accommodate expressed in the Commission's 1967 Guidelines by adding section 701(j).

In 1977, the United States Supreme Court issued its decision in the case of *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). *Hardison* was brought under section 703(a)(1) because it involved facts occurring before the enactment of Section 701(j). The Court applied the Commission's 1967 Guidelines, but indicated that the result would be the same under Section 701(j). It stated that Trans World Airlines had made reasonable efforts to accommodate the religious needs of its employee, Hardison. The Court held that to require Trans World Airlines to make further attempts at accommodations—by unilaterally violating a seniority provision of the collective bargaining agreement, paying premium wages on a regular basis to another employee to replace Hardison, or creating a serious shortage of necessary employees in another department in order to replace Hardison—would create an undue hardship on the conduct of Trans World Airlines' business, and would therefore, exceed the duty to accommodate Hardison.

In 1978, the Commission conducted public hearings on religious discrimination in New York City, Milwaukee, and Los Angeles in order to respond to the concerns raised by *Hardison*. Approximately 150 witnesses testified or submitted written statements.[5] The witnesses included employers, employees, representatives of religious and labor organizations and representatives of Federal, State and local governments.

The Commission found from the hearings that:

(1) There is widespread confusion concerning the extent of accommodation under the *Hardison* decision.

(2) The religious practices of some individuals and some groups of individuals are not being accommodated.

(3) Some of those practices which are not being accommodated are:

—Observance of a Sabbath or religious holidays;

—Need for prayer break during working hours;

—Practice of following certain dietary requirements;

—Practice of not working during a mourning period for a deceased relative;

—Prohibition against medical examinations;

—Prohibition against membership in labor and other organizations; and

—Practices concerning dress and other personal grooming habits.

(4) Many of the employers who testified had developed alternative employment practices which accommodate the religious practices of employees and prospective employees and which meet the employer's business needs.

(5) Little evidence was submitted by employers which showed actual attempts to accommodate religious practices with resultant unfavorable consequences to the employer's business. Employers appeared to have substantial anticipatory concerns but no, or very little, actual experience with the problems they theorized would emerge by providing reasonable accommodation for religious practices.

Based on these findings, the Commission is revising its Guidelines to clarify the obligation imposed by Section 701(j) to accommodate the religious practices of employees and prospective employees.

PART 1606—GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

Sec.
1606.1 Definition of national origin discrimination.
1606.2 Scope of Title VII protection.
1606.3 The national security exception.
1606.4 The bona fide occupational qualification exception.
1606.5 Citizenship requirements.
1606.6 Selection procedures.
1606.7 Speak-English-only rules.
1606.8 Harassment.

AUTHORITY: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

SOURCE: 45 FR 85635, Dec. 29, 1980, unless otherwise noted.

§ 1606.1 Definition of national origin discrimination.

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general Title VII principles, such as disparate treatment and adverse impact.

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[5] The transcript of the Commission's Hearings on Religious Discrimination can be examined by the public at: The Equal Employment Opportunity Commission, 2401 E Street NW., Washington, D.C. 20506.

§ 1606.2 Scope of Title VII protection.

Title VII of the Civil Rights Act of 1964, as amended, protects individuals against employment discrimination on the basis of race, color, religion, sex or national origin. The Title VII principles of disparate treatment and adverse impact equally apply to national origin discrimination. These Guidelines apply to all entities covered by Title VII (collectively referred to as "employer").

§ 1606.3 The national security exception.

It is not an unlawful employment practice to deny employment opportunities to any individual who does not fulfill the national security requirements stated in Section 703(g) of Title VII.[1]

§ 1606.4 The bona fide occupational qualification exception.

The exception stated in Section 703(e) of Title VII, that national origin may be a bona fide occupational qualification, shall be strictly construed.

§ 1606.5 Citizenship requirements.

(a) In those circumstances, where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by Title VII.[2]

(b) Some State laws prohibit the employment of non-citizens. Where these laws are in conflict with Title VII, they are superseded under Section 708 of the Title.

§ 1606.6 Selection procedures.

(a)(1) In investigating an employer's selection procedures (including those identified below) for adverse impact on the basis of national origin, the Commission will apply the *Uniform Guidelines on Employee Selection Procedures* (UGESP), 29 CFR part 1607. Employers and other users of selection procedures should refer to the UGESP for guidance on matters, such as adverse impact, validation and recordkeeping requirements for national origin groups.

(2) Because height or weight requirements tend to exclude individuals on the basis of national origin,[3] the user is expected to evaluate these selection procedures for adverse impact, regardless of whether the total selection process has an adverse impact based on national origin. Therefore, height or weight requirements are identified here, as they are in the UGESP,[4] as exceptions to the "bottom line" concept.

(b) The Commission has found that the use of the following selection procedures may be discriminatory on the basis of national origin. Therefore, it will carefully investigate charges involving these selection procedures for both disparate treatment and adverse impact on the basis of national origin. However, the Commission does not consider these to be exceptions to the "bottom line" concept:

(1) Fluency-in-English requirements, such as denying employment opportunities because of an individual's foreign accent,[5] or inability to communicate well in English.[6]

(2) Training or education requirements which deny employment opportunities to an individual because of his or her foreign training or education, or which require an individual to be foreign trained or educated.

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[1] See also, 5 U.S.C. 7532, for the authority of the head of a federal agency or department to suspend or remove an employee on grounds of national security.

[2] See *Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86, 92 (1973). See also, E.O. 11935, 5 CFR Part 7.4; and 31 U.S.C. 699(b), for citizenship requirements in certain Federal employment.

[3] See CD 71-1529 (1971), CCH EEOC Decisions ¶6231, 3 FEP Cases 952; CD 71-1418 (1971), CCH EEOC Decisions ¶6223, 3 FEP Cases 580; CD 74-25 (1973), CCH EEOC Decisions ¶6400, 10 FEP Cases 260. *Davis* v. *County of Los Angeles*, 566 F. 2d 1334, 1341-42 (9th Cir., 1977) vacated and remanded as moot on other grounds, 440 U.S. 625 (1979). See also, *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977).

[4] See Section 4C(2) of the *Uniform Guidelines on Employee Selection Procedures*, 29 CFR 1607.4C(2).

[5] See CD AL68-1-155E (1969), CCH EEOC Decisions ¶6008, 1 FEP Cases 921.

[6] See CD YAU9-048 (1969), CCH EEOC Decisions ¶6054, 2 FEP Cases 78.

§ 1606.7 Speak-English-only rules.

(a) *When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.[7] Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.

(b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) *Notice of the rule.* It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

§ 1606.8 Harassment.

(a) The Commission has consistently held that harassment on the basis of national origin is a violation of Title VII. An employer has an affirmative duty to maintain a working environment free of harassment on the basis of national origin.[8]

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct: (1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.

(c) An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of national origin regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of harassment in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

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[7] See CD 71-446 (1970), CCH EEOC Decisions ¶6173, 2 FEP Cases, 1127; CD 72-0281 (1971), CCH EEOC Decisions ¶6293.

[8] See CD CL68-12-431 EU (1969), CCH EEOC Decisions ¶6085, 2 FEP Cases 295; CD 72-0621 (1971), CCH EEOC Decisions ¶6311, 4 FEP Cases 312; CD 72-1561 (1972), CCH EEOC Decisions ¶6354, 4 FEP Cases 852; CD 74-05 (1973), CCH EEOC Decisions ¶6387, 6 FEP Cases 834; CD 76-41 (1975), CCH EEOC Decisions ¶6632. See also, Amendment to *Guidelines on Discrimination Because of Sex*, § 1604.11(a) n. 1, 45 FR 7476 sy 74677 (November 10, 1980).

PART 1607—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

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AUTHORITY: Secs. 709 and 713, Civil Rights Act of 1964 (78 Stat. 265) as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261); 42 U.S.C. 2000e-8, 2000e-12.

SOURCE: 43 FR 38295 and 43 FR 38312, Aug. 25, 1978, unless otherwise noted.

GENERAL PRINCIPLES

§ 1607.1 Statement of purpose.

A. *Need for uniformity—Issuing agencies.* The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers.

B. *Purpose of guidelines.* These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

C. *Relation to prior guidelines.* These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.

§ 1607.2 Scope.

A. *Application of guidelines.* These guidelines will be applied by the Equal Employment Opportunity Commission in the enforcement of title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter "Title VII"); by the Department of Labor, and the contract compliance agencies until the transfer of authority contemplated by the President's Reorganization Plan No. 1 of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter "Executive Order 11246"); by the Civil Service Commission and other Federal agencies subject to section 717 of Title VII; by the Civil Service Commission in exercising its responsibilities toward State and local governments under section 208(b)(1) of the Intergovernmental-Personnel Act; by the Department of Justice in exercising its responsibilities under Federal law; by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended; and by any other Federal agency which adopts them.

B. *Employment decisions.* These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above.

C. *Selection procedures.* These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective affirmative action program; but recruitment practices are not considered by these guidelines to be selection procedures. Similarly, these guidelines do not pertain to the question of the lawfulness of a seniority system within the meaning of section 703(h), Executive Order 11246 or other provisions of Federal law or regulation, except to the extent that such systems utilize selection procedures to determine qualifications or abilities to perform the job. Nothing in these guidelines is intended or should be interpreted as discouraging the use of a selection procedure for the purpose of determining qualifications or for the purpose of selection on the basis of relative qualifications, if the selection procedure had been validated in accord with these guidelines for each such purpose for which it is to be used.

D. *Limitations.* These guidelines apply only to persons subject to Title VII, Executive Order 11246, or other equal employment opportunity requirements of Federal law. These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of handicap.

E. *Indian preference not affected.* These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.

§ 1607.3 Discrimination defined: Relationship between use of selection procedures and discrimination.

A. *Procedure having adverse impact constitutes discrimination unless justified.* The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

B. *Consideration of suitable alternative selection procedures.* Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency. Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines. This subsection is not intended to preclude the combination of procedures into a significantly more valid procedure, if the use of such a combination has been shown to be in compliance with the guidelines.

§ 1607.4 Information on impact.

A. *Records concerning impact.* Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in subparagraph B below in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

B. *Applicable race, sex, and ethnic groups for recordkeeping.* The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), below.

C. *Evaluation of selection rates. The "bottom line."* If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) Where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. *Adverse impact and the "four-fifths rule."* A selection rate for any race, sex, or ethnic group which is less than four-fifths (⅘) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

E. *Consideration of user's equal employment opportunity posture.* In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

(Approved by the Office of Management and Budget under control number 3046-0017)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[43 FR 38295, 38312, Aug. 25, 1978, as amended at 46 FR 63268, Dec. 31, 1981]

§ 1607.5 General standards for validity studies.

A. *Acceptable types of validity studies.* For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. *Criterion-related, content, and construct validity.* Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. *Guidelines are consistent with professional standards.* The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, D.C., 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

D. *Need for documentation of validity.* For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. *Accuracy and standardization.* Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. *Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period.* In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. *Method of use of selection procedures.* The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. *Cutoff scores.* Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

I. *Use of selection procedures for higher level jobs.* If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A "reasonable period of time" will vary for different jobs and employment situations but will seldom be more than 5 years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

(1) If the majority of those remaining employed do not progress to the higher level job;

(2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or

(3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

J. *Interim use of selection procedures.* Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. *Review of validity studies for currency.* Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

§ 1607.6 Use of selection procedures which have not been validated.

A. *Use of alternate selection procedures to eliminate adverse impact.* A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program. See section 13 below. Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible.

B. *Where validity studies cannot or need not be performed.* There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below.

(1) *Where informal or unscored procedures are used.* When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

(2) *Where formal and scored procedures are used.* When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

§ 1607.7 Use of other validity studies.

A. *Validity studies not conducted by the user.* Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see section 5C above), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

B. *Use of criterion-related validity evidence from other sources.* Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user when the following requirements are met:

(1) *Validity evidence.* Evidence from the available studies meeting the standards of section 14B below clearly demonstrates that the selection procedure is valid;

(2) *Job similarity.* The incumbents in the user's job and the incumbents in the job or group of jobs on which the validity study was conducted perform substantially the same major work behaviors, as shown by appropriate job analyses both on the job or group of jobs on which the validity study was performed and on the job for which the selection procedure is to be used; and

(3) *Fairness evidence.* The studies include a study of test fairness for each race, sex, and ethnic group which constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question. If the studies under consideration satisfy (1) and (2) above but do not contain an investigation of test fairness, and it is not technically feasible for the borrowing user to conduct an internal study of test fairness, the borrowing user may utilize the study until studies conducted elsewhere meeting the requirements of these guidelines show test unfairness, or until such time as it becomes technically feasible to conduct an internal study of test fairness and the results of that study can be acted upon. Users obtaining selection procedures from publishers should consider, as one factor in the decision to purchase a particular selection pro-

cedure, the availability of evidence concerning test fairness.

C. *Validity evidence from multiunit study.* If validity evidence from a study covering more than one unit within an organization statisfies the requirements of section 14B below, evidence of validity specific to each unit will not be required unless there are variables which are likely to affect validity significantly.

D. *Other significant variables.* If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 above.

§ 1607.8 Cooperative studies.

A. *Encouragement of cooperative studies.* The agencies issuing these guidelines encourage employers, labor organizations, and employment agencies to cooperate in research, development, search for lawful alternatives, and validity studies in order to achieve procedures which are consistent with these guidelines.

B. *Standards for use of cooperative studies.* If validity evidence from a cooperative study satisfies the requirements of section 14 below, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly

§ 1607.9 No assumption of validity.

A. *Unacceptable substitutes for evidence of validity.* Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of it's validity be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.

B. *Encouragement of professional supervision.* Professional supervision of selection activities is encouraged but is not a substitute for documented evidence of validity. The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job.

§ 1607.10 Employment agencies and employment services.

A. *Where selection procedures are devised by agency.* An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to device and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact. If adverse impact exists the agency should comply with these guidelines. An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.

B. *Where selection procedures are devised elsewhere.* Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to make referrals pursuant to the results, the employment agency or service should maintain and have available evidence of the impact of the selection and referral procedures which it administers. If adverse impact results the agency or service should comply with these guidelines. If the agency or service seeks to comply with these guidelines by reliance upon validity studies or other data in the possession of the employer, it should obtain and have available such information.

§ 1607.11 Disparate treatment.

The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure—even though validated against job performance in accordance with these guidelines—cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to qualify under less stringent selection procedures previously followed, unless the user demonstrates that the increased standards are required by business necessity. This section does not prohibit a user who has not previously followed merit standards from adopting merit standards which are in compliance with these guidelines; nor does it preclude a user who has previously used invalid or unvalidated selection procedures from developing and using procedures which are in accord with these guidelines.

§ 1607.12 Retesting of applicants.

Users should provide a reasonable opportunity for retesting and reconsideration. Where examinations are administered periodically with public notice, such reasonable opportunity exists, unless persons who have previously been tested are precluded from retesting. The user may however take reasonable steps to preserve the security of its procedures.

§ 1607.13 Affirmative action.

A. Affirmative action obligations. The use of selection procedures which have been validated pursuant to these guidelines does not relieve users of any obligations they may have to undertake affirmative action to assure equal employment opportunity. Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives.

B. *Encouragement of voluntary affirmative action programs.* These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. The agencies issuing and endorsing these guidelines endorse for all private employers and reaffirm for all governmental employers the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies" (41 FR 38814, September 13, 1976). That policy statement is attached hereto as appendix, section 17.

TECHNICAL STANDARDS

§ 1607.14 Technical standards for validity studies.

The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines. See sections 6 and 7 above.

A. *Validity studies should be based on review of information about the job.* Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) below with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

B. *Technical standards for criterion-related validity studies.* (1) *Technical feasibility.* Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2) *Analysis of the job.* There should be a review of job information to determine measures of work behavior(s) or performance that are relevant to the job or group of jobs in question. These measures or criteria are relevant to the extent that they represent critical or important job duties, work behaviors or work outcomes as developed from the review of job information. The possibility of bias should be considered both in selection of the criterion measures and their application. In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group. The relevance of criteria and their freedom from bias are of particular concern when there are significant differences in measures of job performance for different groups.

(3) *Criterion measures.* Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures. Whatever criteria are used should represent important or critical work behavior(s) or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context. These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service. A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. Where performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparsion of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. Measures of relative success in training include but are not limited to instructor evaluations, performance samples, or tests. Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

(4) *Representativeness of the sample.* Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market. In determining the representativeness of the sample in a concurrent validity study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are those which employees learn on the job.

Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or that these factors are included in the design of the study and their effects identified.

(5) *Statistical relationships.* The degree of relationship between selection procedure scores and criterion measures should be examined and computed, using professionally acceptable statistical procedures. Generally, a selection procedure is considered related to the criterion, for the purposes of these guidelines, when the relationship between performance on the procedure and performance on the criterion measure is statistically significant at the 0.05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance. Absence of a statistically significant relationship between a selection procedure and job performance should not necessarily discourage other investigations of the validity of that selection procedure.

(6) *Operational use of selection procedures.* Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cutoff scores or rank ordering. Generally, if other factors reman the same, the greater the magnitude of the relationship (e.g., correlation coefficent) between performance on a selection procedure and one or more criteria of performance on the job, and the greater the importance and number of aspects of job performance covered by the criteria, the more likely it is that the procedure will be appropriate for use. Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact. Sole reliance upon a single selection instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review. The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations. In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account: The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity.

(7) *Overstatement of validity findings.* Users should avoid reliance upon techniques which tend to overestimate validity findings as a result of capitalization on chance unless an appropriate safeguard is taken. Reliance upon a few selection procedures or criteria of successful job performance when many selection procedures or criteria of performance have been studied, or the use of optimal statistical weights for selection procedures computed in one sample, are techniques which tend to inflate validity estimates as a result of chance. Use of a large sample is one safeguard: cross-validation is another.

(8) *Fairness.* This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a a job class, or test developers; and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

(a) *Unfairness defined.* When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.

(b) *Investigation of fairness.* Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classifications set forth in section 4 above and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness. Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

(c) *General considerations in fairness investigations.* Users conducting a study of fairness should review the A.P.A. Standards regarding investigation of possible bias in testing. An investigation of fairness of a selection procedure depends on both evidence of validity and the manner in which the selection procedure is to be used in a particular employment context. Fairness of a selection procedure cannot necessarily be specified in advance without investigating these factors. Investigation of fairness of a selection procedure in samples where the range of scores on selection procedures or criterion measures is severely restricted for any subgroup sample (as compared to other subgroup samples) may produce misleading evidence of unfairness. That factor should accordingly be taken into account in conducting such studies and before reliance is placed on the results.

(d) *When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected.

(e) *Technical feasibility of fairness studies.* In addition to the general conditions needed for technical feasibility for the conduct of a criterion-related study (see section 16, below) an investigation of fairness requires the following:

(i) An adequate sample of persons in each group available for the study to achieve findings of statistical significance. Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness; but the user has the obligation otherwise to comply with these guidelines.

(ii) The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or such factors should be included in the design of the study and their effects identified.

(f) *Continued use of selection procedures when fairness studies not feasible.* If a study of fairness should otherwise be performed, but is not technically feasible, a selection procedure may be used which has otherwise met the validity standards of these guidelines, unless the technical infeasibility resulted from discriminatory employment practices which are demonstrated by facts other than past failure to conform with requirements for validation of selection procedures. However, when it becomes technically feasible for the user to perform a study of fairness and such a study is otherwise called for, the user should conduct the study of fairness.

C. *Technical standards for content validity studies*—(1) *Appropriateness of content validity studies.* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

(2) *Job analysis for content validity.* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

(3) *Development of selection procedures.* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) *Standards for demonstrating content validity.* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

(5) *Reliability.* The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user. Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure.

(6) *Prior training or experience.* A requirement for or evaluation of specific prior training or experience based on content validity, including a specifi-

cation of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training and the specific behaviors, products, knowledges, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.

(7) *Content validity of training success.* Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job.

(8) *Operational use.* A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (i.e., a behavior which is necessary for performance of the job) or work behaviors which constitute most of the important parts of the job.

(9) *Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

D. *Technical standards for construct validity studies*— (1) *Appropriateness of construct validity studies.* Construct validity is a more complex strategy than either criterion-related or content validity. Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below.

(2) *Job analysis for construct validity studies.* There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance of the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work behaviors in the job or jobs in question. Each construct should be named and defined, so as to distinguish it from other constructs. If a group of jobs is being studied the jobs should have in common one or more critical or important work behaviors at a comparable level of complexity.

(3) *Relationship to the job.* A selection procedure should then be identified or developed which measures the construct identified in accord with subparagraph (2) above. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of section 14B above.

(4) *Use of construct validity study without new criterion-related evidence*—(a) *Standards for use.* Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfies section 14B above only

when the selection procedure has been used elsewhere in a situation in which a criterion-related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion-related validity studies as set forth above in section 7. However, if a study pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies subparagraphs 14B (2) and (3) above for those jobs with criterion-related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains. If construct validity is to be generalized to other jobs or groups of jobs not in the group studied, the Federal enforcement agencies will expect at a minimum additional empirical research evidence meeting the standards of subparagraphs section 14B (2) and (3) above for the additional jobs or groups of jobs.

(b) *Determination of common work behaviors.* In determining whether two or more jobs have one or more work behavior(s) in common, the user should compare the observed work behavior(s) in each of the jobs and should compare the observed work product(s) in each of the jobs. If neither the observed work behavior(s) in each of the jobs nor the observed work product(s) in each of the jobs are the same, the Federal enforcement agencies will presume that the work behavior(s) in each job are different. If the work behaviors are not observable, then evidence of similarity of work products and any other relevant research evidence will be considered in determining whether the work behavior(s) in the two jobs are the same.

DOCUMENTATION OF IMPACT AND VALIDITY EVIDENCE

§ 1607.15 Documentation of impact and validity evidence.

A. *Required information.* Users of selection procedures other than those users complying with section 15A(1) below should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below.

(1) *Simplified recordkeeping for users with less than 100 employees.* In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO-1, et seq., reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year:

(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;

(b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and

(c) The selection procedures utilized (either standardized or not standardized).

These records should be maintained for each race or national origin group (see section 4 above) constituting more than two percent (2%) of the labor force in the relevant labor area. However, it is not necessary to maintain records by race and/or national origin (see § 4 above) if one race or national origin group in the relevant labor area constitutes more than ninety-eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 8).

(2) *Information on impact*—(a) *Collection of information on impact.* Users of selection procedures other than those complying with section 15A(1) above should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are called for by sections 4B above. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce. Where a total selection process for a job has an adverse

impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components except in circumstances set forth in subsection 15A(2)(b) below. If the determination of adverse impact is made using a procedure other than the "four-fifths rule," as defined in the first sentence of section 4D above, a justification, consistent with section 4D above, for the procedure used to determine adverse impact should be available.

(b) *When adverse impact has been eliminated in the total selection process.* Whenever the total selection process for a particular job has had an adverse impact, as defined in section 4 above, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact. In addition, the user should continue to collect such information for at least two (2) years after the adverse impact has been eliminated.

(c) *When data insufficient to determine impact.* Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in section 15(A)(2)(a) above until the information is sufficient to determine that the overall selection process does not have an adverse impact as defined in section 4 above, or until the job has changed substantially.

(3) *Documentation of validity evidence.*—(a) *Types of evidence.* Where a total selection process has an adverse impact (see section 4 above) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence:

(i) Documentation evidence showing criterion-related validity of the selection procedure (see section 15B, below).

(ii) Documentation evidence showing content validity of the selection procedure (see section 15C, below).

(iii) Documentation evidence showing construct validity of the selection procedure (see section 15D, below).

(iv) Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see section 15E, below).

(v) Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

(b) *Form of report.* This evidence should be compiled in a reasonably complete and organized manner to permit direct evaluation of the validity of the selection procedure. Previously written employer or consultant reports of validity, or reports describing validity studies completed before the issuance of these guidelines are acceptable if they are complete in regard to the documentation requirements contained in this section, or if they satisfied requirements of guidelines which were in effect when the validity study was completed. If they are not complete, the required additional documentation should be appended. If necessary information is not available the report of the validity study may still be used as documentation, but its adequacy will be evaluated in terms of compliance with the requirements of these guidelines.

(c) *Completeness.* In the event that evidence of validity is reviewed by an enforcement agency, the validation reports completed after the effective date of these guidelines are expected to contain the information set forth below. Evidence denoted by use of the word "(Essential)" is considered critical. If information denoted essential is not included, the report will be considered incomplete unless the user affirmatively demonstrates either its unavailability due to circumstances beyond the user's control or special circumstances of the user's study which make the information irrelevant. Evidence not so denoted is desirable but its absence will not be a basis for considering a report incomplete. The user should maintain and have available the information called for under the heading "Source Data" in sections 15B(11) and 15D(11). While it is a necessary part of the study, it need not be submitted with the report. All statistical results should be organized and presented in tabular or graphic form to the extent feasible.

B. *Criterion-related validity studies.* Reports of criterion-related validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Dates and location(s) of the job analysis or review of job information, the date(s) and location(s) of the administration of the selection procedures and collection of criterion data, and the time between collection of data on selection procedures and criterion measures should be provided (Essential). If the study was conducted at several locations, the address of each location, including city and State, should be shown.

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job anlysis or review of job information.* A description of the procedure used to analyze the job or group of jobs, or to review the job information should be provided (Essential). Where a review of job information results in criteria which may be used without a full job analysis (see section 14B(3)), the basis for the selection of these criteria should be reported (Essential). Where a job analysis is required a complete description of the work behavior(s) or work outcome(s), and measures of their criticality or importance should be provided (Essential). The report should describe the basis on which the behavior(s) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error, or other appropriate factors (Essential). Where two or more jobs are grouped for a validity study, the information called for in this subsection should be provided for each of the jobs, and the justification for the grouping (see section 14B(1)) should be provided (Essential).

(4) *Job titles and codes.* It is desirable to provide the user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from U.S. Employment Service's Dictionary of Occupational Titles.

(5) *Criterion measures.* The bases for the selection of the criterion measures should be provided, together with references to the evidence considered in making the selection of criterion measures (essential). A full description of all criteria on which data were collected and means by which they were observed, recorded, evaluated, and quantified, should be provided (essential). If rating techniques are used as criterion measures, the appraisal form(s) and instructions to the rater(s) should be included as part of the validation evidence, or should be explicitly described and available (essential). All steps taken to insure that criterion measures are free from factors which would unfairly alter the scores of members of any group should be described (essential).

(6) *Sample description.* A description of how the research sample was identified and selected should be included (essential). The race, sex, and ethnic composition of the sample, including those groups set forth in section 4A above, should be described (essential). This description should include the size of each subgroup (essential). A description of how the research sample compares with the relevant labor market or work force, the method by which the relevant labor market or work force was defined, and a discussion of the likely effects on validity of differences between the sample and the relevant labor market or work force, are also desirable. Descriptions of educational levels, length of service, and age are also desirable.

(7) *Description of selection procedures.* Any measure, combination of measures, or procedure studied should be completely and explicitly described or attached (essential). If commercially available selection procedures are

studied, they should be described by title, form, and publisher (essential). Reports of reliability estimates and how they were established are desirable.

(8) *Techniques and results.* Methods used in analyzing data should be described (essential). Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations and ranges) for all selection procedures and all criteria should be reported for each race, sex, and ethnic group which constitutes a significant factor in the relevant labor market (essential). The magnitude and direction of all relationships between selection procedures and criterion measures investigated should be reported for each relevant race, sex, and ethnic group and for the total group (essential). Where groups are too small to obtain reliable evidence of the magnitude of the relationship, need not be reported separately. Statements regarding the statistical significance of results should be made (essential). Any statistical adjustments, such as for less then perfect reliability or for restriction of score range in the selection procedure or criterion should be described and explained; and uncorrected correlation coefficients should also be shown (essential). Where the statistical technique categorizes continuous data, such as biserial correlation and the phi coefficient, the categories and the bases on which they were determined should be described and explained (essential). Studies of test fairness should be included where called for by the requirements of section 14B(8) (essential). These studies should include the rationale by which a selection procedure was determined to be fair to the group(s) in question. Where test fairness or unfairness has been demonstrated on the basis of other studies, a bibliography of the relevant studies should be included (essential). If the bibliography includes unpublished studies, copies of these studies, or adequate abstracts or summaries, should be attached (essential). Where revisions have been made in a selection procedure to assure compatability between successful job performance and the probability of being selected, the studies underlying such revisions should be included (essential). All statistical results should be organized and presented by relevant race, sex, and ethnic group (essential).

(9) *Alternative procedures investigated.* The selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(10) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(11) *Source data.* Each user should maintain records showing all pertinent information about individual sample members and raters where they are used, in studies involving the validation of selection procedures. These records should be made available upon request of a compliance agency. In the case of individual sample members these data should include scores on the selection procedure(s), scores on criterion measures, age, sex, race, or ethnic group status, and experience on the specific job on which the validation study was conducted, and may also include such things as education, training, and prior job experience, but should not include names and social security numbers. Records should be maintained which show the ratings

given to each sample member by each rater.

(12) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(13) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

C. *Content validity studies.* Reports of content validity for a selection procedure should include the following information:

(1) *User(s), location(s) and date(s) of study.* Dates and location(s) of the job analysis should be shown (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis—Content of the job.* A description of the method used to analyze the job should be provided (essential). The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (essential). Measures of criticality and/or importance of the work behavior(s) and the method of determining these measures should be provided (essential). Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill, or ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential). The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s).

(4) *Selection procedure and its content.* Selection procedures, including those constructed by or for the user, specific training requirements, composites of selection procedures, and any other procedure supported by content validity, should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be described by title, form, and publisher (essential). The behaviors measured or sampled by the selection procedure should be explicitly described (essential). Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a representative sample of the knowledge, skill, or ability should be provided (essential).

(5) *Relationship between the selection procedure and the job.* The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior should be provided (essential). The user should identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure (essential). Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided of the manner, setting, and the level of complexity of the selection procedure with those of the work situation (essential). If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the procedure or in its administration, these steps should be described. Establishment of time limits, if any, and how these limits are related to the speed with which duties must be performed on the job, should be explained. Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations) and estimates of realibility should be reported for all selection procedures if available. Such reports should be made for relevant race, sex, and ethnic subgroups, at least on a statistically reliable sample basis.

(6) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(7) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential). In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance.

(8) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(9) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

D. *Construct validity studies.* Reports of construct validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Date(s) and location(s) of the job analysis and the gathering of other evidence called for by these guidelines should be provided (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Construct definition.* A clear definition of the construct(s) which are believed to underlie successful performance of the critical or important work behavior(s) should be provided (essential). This definition should include the levels of construct performance relevant to the job(s) for which the selection procedure is to be used (essential). There should be a summary of the position of the construct in the psychological literature, or in the absence of such a position, a description of the way in which the definition and measurement of the construct was developed and the psychological theory underlying it (essential). Any quantitative data which identify or define the job constructs, such as factor analyses, should be provided (essential).

(4) *Job analysis.* A description of the method used to analyze the job should be provided (essential). A complete description of the work behavior(s) and, to the extent appropriate, work outcomes and measures of their criticality and/or importance should be provided (essential). The report should also describe the basis on which the behavior(s) or outcomes were determined to be important, such as their level of difficulty, their frequency of performance, the consequences of error or other appropriate factors (essential). Where jobs are grouped or compared for the purposes of generalizing validity evidence, the work behavior(s) and work product(s) for each of the jobs should be described, and conclusions concerning the similarity of the jobs in terms of observable work behaviors or work products should be made (essential).

(5) *Job titles and codes.* It is desirable to provide the selection procedure user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from the United States Employment Service's dictionary of occupational titles.

(6) *Selection procedure.* The selection procedure used as a measure of the construct should be completely

and explicitly described or attached (essential). If commercially available selection procedures are used, they should be identified by title, form and publisher (essential). The research evidence of the relationship between the selection procedure and the construct, such as factor structure, should be included (essential). Measures of central tendency, variability and reliability of the selection procedure should be provided (essential). Whenever feasible, these measures should be provided separately for each relevant race, sex and ethnic group.

(7) *Relationship to job performance.* The criterion-related study(ies) and other empirical evidence of the relationship between the construct measured by the selection procedure and the related work behavior(s) for the job or jobs in question should be provided (essential). Documentation of the criterion-related study(ies) should satisfy the provisions of section 15B above or section 15E(1) below, except for studies conducted prior to the effective date of these guidelines (essential). Where a study pertains to a group of jobs, and, on the basis of the study, validity is asserted for a job in the group, the observed work behaviors and the observed work products for each of the jobs should be described (essential). Any other evidence used in determining whether the work behavior(s) in each of the jobs is the same should be fully described (essential).

(8) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings should be fully described (essential).

(9) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(10) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

(11) *Source data.* Each user should maintain records showing all pertinent information relating to its study of construct validity.

(12) *Contact person.* The name, mailing address, and telephone number of the individual who may be contacted for further information about the validity study should be provided (essential).

E. *Evidence of validity from other studies.* When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate section of this section 15 above. In addition, the following evidence should be supplied:

(1) *Evidence from criterion-related validity studies.*—a. *Job information.* A description of the important job behavior(s) of the user's job and the basis on which the behaviors were determined to be important should be provided (essential). A full description of the basis for determining that these important work behaviors are the same as those of the job in the original study (or studies) should be provided (essential).

b. *Relevance of criteria.* A full description of the basis on which the criteria used in the original studies are determined to be relevant for the user should be provided (essential).

c. *Other variables.* The similarity of important applicant pool or sample characteristics reported in the original studies to those of the user should be described (essential). A description of the comparison between the race, sex and ethnic composition of the user's relevant labor market and the sample in the original validity studies should be provided (essential).

d. *Use of the selection procedure.* A full description should be provided showing that the use to be made of the selection procedure is consistent with the findings of the original validity studies (essential).

e. *Bibliography.* A bibliography of reports of validity of the selection procedure for the job or jobs in question should be provided (essential). Where any of the studies included an investigation of test fairness, the results of this investigation should be provided (essential). Copies of reports published in journals that are not commonly available should be described in detail or attached (essential). Where a user is relying upon unpublished studies, a reasonable effort should be made to obtain these studies. If these unpublished studies are the sole source of validity evidence they should be described in detail or attached (essential). If these studies are not available, the name and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (essential).

(2) *Evidence from content validity studies.* See section 14C(3) and section 15C above.

(3) *Evidence from construct validity studies.* See sections 14D(2) and 15D above.

F. *Evidence of validity from cooperative studies.* Where a selection procedure has been validated through a cooperative study, evidence that the study satisfies the requirements of sections 7, 8 and 15E should be provided (essential).

G. *Selection for higher level job.* If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this section 15 for the higher level job or jobs, and in addition, the user should provide: (1) a description of the job progression structure, formal or informal; (2) the data showing how many employees progress to the higher level job and the length of time needed to make this progression; and (3) an identification of any anticipated changes in the higher level job. In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

H. *Interim use of selection procedures.* If a selection procedure is being used on an interim basis because the procedure is not fully supported by the required evidence of validity, the user should maintain and have available (1) substantial evidence of validity for the procedure, and (2) a report showing the date on which the study to gather the additional evidence commenced, the estimated completion date of the study, and a description of the data to be collected (essential).

(Approved by the Office of Management and Budget under control number 3046-0017)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[43 FR 38295, 38312, Aug. 25, 1978, as amended at 46 FR 63268, Dec. 31, 1981]

DEFINITIONS

§ 1607.16 Definitions.

The following definitions shall apply throughout these guidelines:

A. *Ability.* A present competence to perform an observable behavior or a behavior which results in an observable product.

B. *Adverse impact.* A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.

C. *Compliance with these guidelines.* Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see section 4, above), or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law. See section 6B, above.

D. *Content validity.* Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job. See section 5B and section 14C.

E. *Construct validity.* Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. See section 5B and section 14D.

F. *Criterion-related validity.* Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior. See sections 5B and 14B.

G. *Employer.* Any employer subject to the provisions of the Civil Rights Act of 1964, as amended, including State or local governments and any Federal agency subject to the provisions of section 717 of the Civil Rights Act of 1964, as amended, and any Federal contractor or subcontractor or federally assisted construction contractor or subcontactor covered by Executive Order 11246, as amended.

H. *Employment agency.* Any employment agency subject to the provisions of the Civil Rights Act of 1964, as amended.

I. *Enforcement action.* For the purposes of section 4 a proceeding by a Federal enforcement agency such as a lawsuit or an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds; but not a finding of reasonable cause or a conciliation process or the issuance of right to sue letters under title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

J. *Enforcement agency.* Any agency of the executive branch of the Federal Government which adopts these guidelines for purposes of the enforcement of the equal employment opportunity laws or which has responsibility for securing compliance with them.

K. *Job analysis.* A detailed statement of work behaviors and other information relevant to the job.

L. *Job description.* A general statement of job duties and responsibilities.

M. *Knowledge.* A body of information applied directly to the performance of a function.

N. *Labor organization.* Any labor organization subject to the provisions of the Civil Rights Act of 1964, as amended, and any committee subject thereto controlling apprenticeship or other training.

O. *Observable.* Able to be seen, heard, or otherwise perceived by a person other than the person performing the action.

P. *Race, sex, or ethnic group.* Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin.

Q. *Selection procedure.* Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

R. *Selection rate.* The proportion of applicants or candidates who are hired, promoted, or otherwise selected.

S. *Should.* The term "should" as used in these guidelines is intended to connote action which is necessary to achieve compliance with the guidelines, while recognizing that there are circumstances where alternative courses of action are open to users.

T. *Skill.* A present, observable competence to perform a learned psychomoter act.

U. *Technical feasibility.* The existence of conditions permitting the conduct of meaningful criterion-related validity studies. These conditions include: (1) An adequate sample of persons available for the study to achieve findings of statistical significance; (2) having or being able to obtain a sufficient range of scores on the selection procedure and job performance measures to produce validity results which can be expected to be representative of the results if the ranges normally expected were utilized; and (3) having or being able to devise unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy. See section 14B(2). With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See section 14B(8).

V. *Unfairness of selection procedure.* A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences are not reflected in differences in measures of job performance. See section 14B(7).

W. *User.* Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision. Whenever an employer, labor organization, or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be considered the user with respect to those licensing or certification requirements. Whenever a State employment agency or service does no more than administer or monitor a procedure as permitted by Department of Labor regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user.

X. *Validated in accord with these guidelines or properly validated.* A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by section 3B, and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines.

Y. *Work behavior.* An activity performed to achieve the objectives of the job. Work behaviors involve observable (physical) components and unobservable (mental) components. A work behavior consists of the performance of one or more tasks. Knowledges, skills, and abilities are not behaviors, although they may be applied in work behaviors.

APPENDIX

§ 1607.17 Policy statement on affirmative action (see section 13B).

The Equal Employment Opportunity Coordinating Council was established by act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal Government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

(1) Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or

ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

(2) Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether precentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the precentages of those groups available in the relevant job market who possess the basic job-related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic "conscious," include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

(b) A recruitment program designed to attract qualified members of the group in question;

(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge or skills to enter and, with appropriate training, to progress in a career field;

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection.

(f) A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity.

Respectfully submitted,

Harold R. Tyler, Jr.,
Deputy Attorney General and Chairman of the Equal Employment Coordinating Council.

Michael H. Moskow,
Under Secretary of Labor.

Ethel Bent Walsh,
Acting Chairman, Equal Employment Opportunity Commission.

Robert E. Hampton,
Chairman, Civil Service Commission.

Arthur E. Flemming,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done this 26th day of August 1976.

Richard Albrecht,
General Counsel,
Department of the Treasury.

§ 1607.18 Citations.

The official title of these guidelines is "Uniform Guidelines on Employee Selection Procedures (1978)". The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

The official citation is:

"Section ——, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR —— (August 25, 1978)."

The short form citation is:

"Section ——, U.G.E.S.P. (1978); 43 FR —— (August 25, 1978)."

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation The specific additional citations are as follows:

Equal Employment Opportunity Commission
29 CFR Part 1607
Department of Labor
Office of Federal Contract Compliance Programs
41 CFR Part 60-3
Department of Justice
28 CFR 50.14
Civil Service Commission
5 CFR 300.103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1-18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows: "Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR

——, (August 25, 1978); 29 CFR Part 1607, section 6A."

PART 1608—AFFIRMATIVE ACTION APPROPRIATE UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

Sec.

1608.1 Statement of purpose.
1608.2 Written interpretation and opinion.
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1608.4 Establishing affirmative action plans.
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1608.8 Adherence to court order.
1608.9 Reliance on directions of other government agencies.
1608.10 Standard of review.
1608.11 Limitations on the application of these guidelines.
1608.12 Equal employment opportunity plans adopted pursuant to section 717 of Title VII.

Authority: Sec. 713 the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12, 78 Stat. 265.

Source: 44 FR 4422, Jan. 19, 1979, unless otherwise noted.

§ 1608.1 Statement of purpose.

(a) *Need for Guidelines.* Since the passage of Title VII in 1964, many employers, labor organizations, and other persons subject to Title VII have changed their employment practices and systems to improve employment opportunities for minorities and women, and this must continue. These changes have been undertaken either on the initiative of the employer, labor organization, or other person subject to Title VII, or as a result of conciliation efforts under Title VII, action under Executive Order No. 11246, as amended, or under other Federal, state, or local laws, or litigation. Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment opportunity. Occasionally, these actions have been challenged as inconsistent with Title VII, because they took into account race, sex, or national origin. This is the so-called "reverse discrimination" claim. In such a situation, both the affirmative action undertaken to improve the conditions of minorities and women, and the objection to that action, are based upon the principles of Title VII. Any uncertainty as to the meaning and application of Title VII in such situations threatens the accomplishment of the clear Congressional intent to encourage voluntary affirmative action. The Commission believes that by the enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect of Title VII litigation. The Commission believes that it is now necessary to clarify and harmonize the principles of Title VII in order to achieve these Congressional objectives and protect those employers, labor organizations, and other persons who comply with the principles of Title VII.

(b) *Purposes of Title VII.* Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.[2] The Legislative

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[2] Congress has also addressed these conditions in other laws, including the Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56 (1963), as amended; the other Titles of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964), as amended; the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965), as amended; the Fair Housing Act of 1968, Pub. L. 90-284, Title VII, 82 Stat. 73, 81 (1968), as amended; the Educational Opportunity Act (Title IX), Pub. L. 92-318, 86

Continued

Histories of Title VII, the Equal Pay Act, and the Equal Employment Opportunity Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and the consequent lower income levels of minorities and women.[3] The purpose of Executive Order No. 11246, as amended, is similar to the purpose of Title VII. In response to these economic and social conditions, Congress, by passage of Title VII, established a national policy against discrimination in employment on grounds of race, color, religion, sex, and national origin. In addition, Congress strongly encouraged employers, labor organizations, and other persons subject to Title VII (hereinafter referred to as "persons," see section 701(a) of the Act) to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action. Conference, conciliation, and persuasion were the primary processes adopted by Congress in 1964, and reaffirmed in 1972, to achieve these objectives, with enforcement action through the courts or agencies as a supporting procedure where voluntary action did not take place and conciliation failed. See § 706 of Title VII.

(c) *Interpretation in furtherance of legislative purpose.* The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII.[4] Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation. Rather, persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of Title VII. Correspondingly, Title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against Title VII liability which the Commission is authorized to provide under section 713(b)(1).

(d) *Guidelines interpret Title VII and authorize use of Section 713(b)(1).* These Guidelines describe the circumstances in which persons subject to Title VII may take or agree upon action to improve employment opportunities of minorities and women, and describe the kinds of actions they may take which are consistent with Title VII. These Guidelines constitute the Commission's interpretation of Title

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Stat. 373 (1972), as amended; and the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972), as amended.

[3] Equal Pay Act of 1963: S. Rep. No. 176, 88th Cong., 1st Sess., 1-2 (1963). Civil Rights Act of 1964: H.R. Rep. No. 914, pt. 2, 88th Cong., 1st Sess. (1971). Equal Employment Opportunity Act of 1972: H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971). See also, Equal Employment Opportunity Commission, *Equal Employment Opportunity Report—1975, Job Patterns for Women in Private Industry* (1977); Equal Employment Opportunity Commission, *Minorities and Women in State and Local Government—1975* (1977); United States Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (1978).

[4] Affirmative action often improves opportunities for all members of the workforce, as where affirmative action includes the posting of notices of job vacancies. Similarly, the integration of previously segregated jobs means that all workers will be provided opportunities to enter jobs previously restricted. See, e.g., *EEOC* v. *AT&T*, 419 F. Supp. 1022 (E.D.Pa. 1976), *aff'd*, 556 F. 2d 167 (3rd Cir. 1977), *cert. denied*, 98 S.Ct. 3145 (1978).

VII and will be applied in the processing of claims of discrimination which involve voluntary affirmative action plans and programs. In addition, these Guidelines state the circumstances under which the Commission will recognize that a person subject to Title VII is entitled to assert that actions were taken "in good faith, in conformity with, and in reliance upon a written interpretation or opinion of the Commission," including reliance upon the interpretation and opinion contained in these Guidelines, and thereby invoke the protection of section 713(b)(1) of Title VII.

(e) *Review of existing plans recommended.* Only affirmative action plans or programs adopted in good faith, in conformity with, and in reliance upon these Guidelines can receive the full protection of these Guidelines, including the section 713(b)(1) defense. See § 1608.10. Therefore, persons subject to Title VII who have existing affirmative action plans, programs, or agreements are encouraged to review them in light of these Guidelines, to modify them to the extent necessary to comply with these Guidelines, and to readopt or reaffirm them.

§ 1608.2 Written interpretation and opinion.

These Guidelines constitute "a written interpretation and opinion" of the Equal Employment Opportunity Commission as that term is used in section 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(b)(1), and section 1601.33 of the Procedural Regulations of the Equal Employment Opportunity Commission (29 CFR 1601.30; 42 FR 55,394 (October 14, 1977)). Section 713(b)(1) provides:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission * * *. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that * * * after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect * * *.

The applicability of these Guidelines is subject to the limitations on use set forth in § 1608.11.

§ 1608.3 Circumstances under which voluntary affirmative action is appropriate.

(a) *Adverse effect.* Title VII prohibits practices, procedures, or policies which have an adverse impact unless they are justified by business necessity. In addition, Title VII proscribes practices which "tend to deprive" persons of equal employment opportunities. Employers, labor organizations and other persons subject to Title VII may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

(b) *Effects of prior discriminatory practices.* Employers, labor organizations, or other persons subject to Title VII may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.

(c) *Limited labor pool.* Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labor organizations, and other persons subject to Title VII may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

(1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;

(2) Extensive and focused recruiting activity;

(3) Elimination of the adverse impact caused by unvalidated selection criteria (see sections 3 and 6, Uniform Guidelines on Employee Selection Procedures (1978), 43 FR 30,290; 38,297; 38,299 (August 25, 1978));

(4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

§ 1608.4 Establishing affirmative action plans.

An affirmative action plan or program under this section shall contain three elements: a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action.

(a) *Reasonable self analysis.* The objective of a self analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why. There is no mandatory method of conducting a self analysis. The employer may utilize techniques used in order to comply with Executive Order No. 11246, as amended, and its implementing regulations, including 41 CFR Part 60-2 (known as Revised Order 4), or related orders issued by the Office of Federal Contract Compliance Programs or its authorized agencies, or may use an analysis similar to that required under other Federal, state, or local laws or regulations prohibiting employment discrimination. In conducting a self analysis, the employer, labor organization, or other person subject to Title VII should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

(b) *Reasonable basis.* If the self analysis shows that one or more employment practices: (1) Have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited, (2) leave uncorrected the effects of prior discrimination, or (3) result in disparate treatment, the person making the self analysis has a reasonable basis for concluding that action is appropriate. It is not necessary that the self analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exists arguable defenses to a Title VII action.

(c) *Reasonable action.* The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect or past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.

(1) *Illustrations of appropriate affirmative action.* Affirmative action plans or programs may include, but are not limited to, those described in the Equal Employment Opportunity Coordinating Council "Policy Statement on Affirmative Action Programs for State and Local Government Agencies," 41 FR 38,814 (September 13, 1976), reaffirmed and extended to all persons subject to Federal equal employment opportunity laws and orders, in the Uniform Guidelines on Employee Selection Procedures (1978) 43 FR 38,290; 38,300 (Aug. 25, 1978). That statement reads, in relevant part:

> When an employer has reason to believe that its selection procedures have * * * exclusionary effect * * *, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic 'conscious,'

include, but are not limited to, the following:

The establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

A recruitment program designed to attract qualified members of the group in question;

A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking 'journeyman' level knowledge or skills to enter and, with appropriate training, to progress in a career field;

Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(2) *Standards of reasonable action.* In considering the reasonableness of a particular affirmative action plan or program, the Commission will generally apply the following standards:

(i) The plan should be tailored to solve the problems which were identified in the self analysis, see § 1608.4(a), supra, and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole. The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives.

(ii) Goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available.

(d) *Written or unwritten plans or programs*—(1) *Written plans required for 713(b)(1) Protection.* The protection of section 713(b) of Title VII will be accorded by the Commission to a person subject to Title VII only if the self analysis and the affirmative action plan are dated and in writing, and the plan otherwise meets the requirements of Section 713(b)(1). The Commission will not require that there be any written statement concluding that a Title VII violation exists.

(2) *Reasonable cause determinations.* Where an affirmative action plan or program is alleged to violate Title VII, or is asserted as a defense to a charge of discrimination, the Commission will investigate the charge in accordance with its usual procedures and pursuant to the standards set forth in these Guidelines, whether or not the analysis and plan are in writing. However, the absence of a written self analysis and a written affirmative action plan or program may make it more difficult to provide credible evidence that the analysis was conducted, and that action was taken pursuant to a plan or program based on the analysis. Therefore, the Commission recommends that such analyses and plans be in writing.

§ 1608.5 Affirmative action compliance programs under Executive Order No. 11246, as amended.

Under Title VII, affirmative action compliance programs adopted pursuant to Executive Order No. 11246, as amended, and its implementing regulations, including 41 CFR Part 60-2 (Revised Order 4), will be considered by the Commission in light of the similar purposes of Title VII and the Executive Order, and the Commission's responsibility under Executive Order No. 12067 to avoid potential conflict among Federal equal employment opportunity programs. Accordingly, the Commission will process Title VII complaints involving such affirmative action compliance programs under this section.

(a) *Procedures for review of Affirmative Action Compliance Programs.* If adherence to an affirmative action compliance program adopted pursuant to Executive Order No. 11246, as amended, and its implementing regulations, is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine whether the affirmative action compliance program was adopted by a person subject to the Order and pursuant to the Order, and whether adherence to the program was the basis of the complaint or the justification.

(1) *Programs previously approved.* If the Commission makes the determination described in paragraph (a) of this section and also finds that the affirmative action program has been approved by an appropriate official of the Department of Labor or its authorized agencies, or is part of a conciliation or settlement agreement or an order of an administrative agency, whether entered by consent or after contested proceedings brought to enforce Executive Order No. 11246, as amended, the Commission will issue a determination of no reasonable cause.

(2) *Program not previously approved.* If the Commission makes the determination described in paragraph (a), of this section but the program has not been approved by an appropriate official of the Department of Labor or its authorized agencies, the Commission will: (i) Follow the procedure in § 1608.10(a) and review the program, or (ii) refer the plan to the Department of Labor for a determination of whether it is to be approved under Executive Order No. 11246, as amended, and its implementing regulations. If, the Commission finds that the program does conform to these Guidelines, or the Department of Labor approves the affirmative action compliance program, the Commission will issue a determination of no reasonable cause under § 1608.10(a).

(b) *Reliance on these guidelines.* In addition, if the affirmative action compliance program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of Title VII and of § 1608.10(b), below, may be asserted by the contractor.

§ 1608.6 Affirmative action plans which are part of Commission conciliation or settlement agreements.

(a) *Procedures for review of plans.* If adherence to a conciliation or settlement agreement executed under Title VII and approved by a responsible official of the EEOC is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action challenged under Title VII, the Commission will investigate to determine: (1) Whether the conciliation agreement or settlement agreement was approved by a responsible official of the EEOC, and (2) whether adherence to the agreement was the basis for the complaint or justification. If the Commission so finds, it will make a determination of no reasonable cause under § 1608.10(a) and will advise the respondent of its right under section 713(b)(1) of Title VII to rely on the conciliation agreement.

(b) *Reliance on these guidelines.* In addition, if the affirmative action plan or program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of Title VII and of § 1608.10(b), below, may be asserted by the respondent.

§ 1608.7 Affirmative action plans or programs under State or local law.

Affirmative action plans or programs executed by agreement with state or local government agencies, or by order of state or local government agencies, whether entered by consent or after contested proceedings, under statutes or ordinances described in Title VII, will be reviewed by the Commission in light of the similar purposes of Title VII and such statutes and ordinances. Accordingly, the Commission will process Title VII complaints involving such affirmative action plans or programs under this section.

(a) *Procedures for review of plans or programs.* If adherence to an affirmative action plan or program executed pursuant to a state statute or local ordinance described in Title VII is the basis of a complaint filed under Title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine: (1) Whether the affirmative action plan or program was executed by an employer, labor organization, or person subject to the statute or ordinance, (2) whether the agreement was approved by an appropriate official of the state or local government, and (3) whether adherence to the plan or program was the basis of the complaint or justification.

(1) *Previously Approved Plans or Programs.* If the Commission finds the facts described in paragraph (a) of this section, the Commission will, in accordance with the "substantial weight" provisions of section 706 of the Act, find no reasonable cause where appropriate.

(2) *Plans or Programs not previously approved.* If the plan or program has not been approved by an appropriate official of the state or local government, the Commission will follow the procedure of § 1608.10 of these Guidelines. If the Commission finds that the plan or program does conform to these Guidelines, the Commission will make a determination of no reasonable cause as set forth in § 1608.10(a).

(b) *Reliance on these guidelines.* In addition, if the affirmative action plan or program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) and § 1608.10(b), below, may be asserted by the respondent.

§ 1608.8 Adherence to court order.

Parties are entitled to rely on orders of courts of competent jurisdiction. If adherence to an Order of a United States District Court or other court of competent jurisdiction, whether entered by consent or after contested litigation, in a case brought to enforce a Federal, state, or local equal employment opportunity law or regulation is the basis of a complaint filed under Title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine: (a) Whether such an Order exists and (b) whether adherence to the affirmative action plan which is part of the Order was the basis of the complaint or justification. If the Commission so finds, it will issue a determination of no reasonable cause. The Commission interprets Title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII.

§ 1608.9 Reliance on directions of other government agencies.

When a charge challenges an affirmative action plan or program, or when such a plan or program is raised as justification for an employment decision, and when the plan or program was developed pursuant to the requirements of a Federal or state law or regulation which in part seeks to ensure equal employment opportunity, the Commission will process the charge in accordance with § 1608.10(a). Other agencies with equal employment opportunity responsibilities may apply the principles of these Guidelines in the exercise of their authority.

§ 1608.10 Standard of review.

(a) *Affirmative action plans or programs not specifically relying on these guidelines.* If, during the investigation of a charge of discrimination filed with the Commission, a respondent asserts that the action complained of was taken pursuant to an in accordance with a plan or program of the type described in these Guidelines, the Commission will determine whether the assertion is true, and if so, whether such a plan or program conforms to the requirements of these guidelines. If the Commission so finds, it will issue a determination of no reasonable cause and, where appropriate, will state that the determination constitutes a written interpretation or opinion of the Commission under section 713(b)(1). This interpretation may be relied upon by the respondent and asserted as a defense in the event that new charges involving similar facts and circumstances are thereafter filed against the respondent, which are based on actions taken pursuant to the affirmative action plan or program. If the Commission does not so find, it will proceed with the investigation in the usual manner.

(b) *Reliance on these guidelines.* If a respondent asserts that the action taken was pursuant to and in accordance with a plan or program which was adopted or implemented in good faith, in conformity with, and in reliance upon these Guidelines, and the self analysis and plan are in writing, the Commission will determine whether such assertion is true. If the Commission so finds, it will so state in the determination of no reasonable cause and will advise the respondent that:

(1) The Commission has found that the respondent is entitled to the protection of section 713(b)(1) of Title VII, and

(2) That the determination is itself an additional written interpretation or opinion of the Commission pursuant to section 713(b)(1).

§ 1608.11 Limitations on the application of these guidelines.

(a) *No determination of adequacy of plan or program.* These Guidelines are applicable only with respect to the circumstances described in § 1608.1(d), above. They do not apply to, and the section 713(b)(1) defense is not available for the purpose of, determining the adequacy of an affirmative action plan or program to eliminate discrimination. Whether an employer who takes such affirmative action has done enough to remedy such discrimination will remain a question of fact in each case.

(b) *Guidelines inapplicable in absence of affirmative action.* Where an affirmative action plan or program does not exist, or where the plan or program is not the basis of the action complained of, these Guidelines are inapplicable.

(c) *Currency of plan or program.* Under section 713(b)(1), persons may rely on the plan or program only during the time when it is current. Currency is related to such factors as progress in correcting the conditions disclosed by the self analysis. The currency of the plan or program is a question of fact to be determined on a case by case basis. Programs developed under Executive Order No. 11246, as amended, will be deemed current in accordance with Department of Labor regulations at 41 CFR Chapter 60, or successor orders or regulations.

§ 1608.12 Equal employment opportunity plans adopted pursuant to section 717 of Title VII.

If adherence to an Equal Employment Opportunity Plan, adopted pursuant to Section 717 of Title VII, and approved by an appropriate official of the U.S. Civil Service Commission, is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action under Title VII, these Guidelines will apply in a manner similar to that set forth in § 1608.5. The Commission will issue regulations setting forth the procedure for processing such complaints.

PART 1610—AVAILABILITY OF RECORDS

Subpart A—Production or Disclosure Under 5 U.S.C. 552

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Subpart A—Production or Disclosure Under 5 U.S.C. 552

AUTHORITY: Sec. 713(a), 78 Stat. 265, 42 U.S.C. 2000e-12(a), 5 U.S.C. 552, as amended by Pub. L. 93-502; for § 1610.15, non search or copy portions are issued under 31 U.S.C. 483a.

SOURCE: 40 FR 8171, Feb. 26, 1975, unless otherwise noted.

§ 1610.1 Definitions.

(a) "Title VII" refers to title VII of the Civil Rights Act of 1964, as amended by Pub. L. 92-261, 42 U.S.C. (Supp. II) 2000e et seq.

(b) "Commission" refers to the Equal Employment Opportunity Commission.

(c) "Freedom of Information Act" refers to 5 U.S.C. 552 (Pub. L. 90-23 as amended by Pub. L. 93-502).

§ 1610.2 Statutory requirements.

5 U.S.C. 552(a)(3) requires each Agency, upon request for reasonably described records made in accordance with published rules stating the time, place, fees, if any, and procedure to be followed, to make such records promptly available to any person. 5 U.S.C. 552(b) exempts specified classes of records from the public access requirements of 5 U.S.C. 552(a) and permits them to be withheld.

§ 1610.3 Purpose and scope.

This subpart contains the regulations of the Equal Employment Opportunity Commission implementing 5 U.S.C. 552. The regulations of this subpart provide information concerning the procedures by which records may be obtained from all organizational units within the Commission. Official records of the Commission made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public only as prescribed by this subpart. Officers and employees of the Commission may continue to furnish to the public, informally and without compliance with the procedures prescribed herein, information and records which prior to the enactment of 5 U.S.C. 552 were furnished customarily in the regular performance of their duties. To the extent that it is not prohibited by other laws, the Commission also will make available records which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

§ 1610.4 Public reference facilities and current index.

(a) The Commission will maintain in a public reading area located in the Commission's library at 2401 E Street NW., Washington, D.C. 20506, the materials which are required by 5 U.S.C. 552(a)(2) and 552(a)(5) to be made available for public inspection and copying. The Commission will maintain and make available for public inspection and copying in this public reading area a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after July 4, 1967, and which is required to be indexed by 5 U.S.C. 552(a)(2). The Commission in it discretion may, however, include precedential materials issued, adopted, or promulgated prior to July 4, 1967. The Commission will also maintain on file in this public reading area all material published by the Commission in the FEDERAL REGISTER and currently in effect.

(b) Each district, area and local office listed in paragraph (c) of this section shall maintain and make available for public inspection and copying a copy of:

(1) The Commission's notices and regulatory amendments which are not yet or have never been published in the Code of Federal Regulations,

(2) The Commission's annual reports,

(3) The Commission's Compliance Manual,

(4) Blank forms relating to the Commission's procedures as they affect the public,

(5) The Commission's Orders (agency directives), and

(6) "CCH Equal Employment Opportunity Commission Decisions" (1973) and Employment Practices Guide (vol. 2), published by Commerce Clearing House, Inc.

(c) The Commission District, Area and Local Offices are:

Albuquerque Area Office (Phoenix District), Western Bank Building, Suite 1515, 505 Marquette, N.W., Albuquerque, New Mexico 87101.

Atlanta District Office, Citizens Trust Bank Building, 10th Floor, 75 Piedmont Avenue, NE., Atlanta, Georgia 30335

Baltimore District Office, 109 Market Place, Suite 4000, Baltimore, Maryland 21202

Birmingham District Office, 2121 Eighth Avenue, North, Birmingham, Alabama 35203.

Boston Area Office (New York District), J. F. Kennedy Federal Bldg., Room 409B, Boston, Massachusetts 02203

Buffalo Local Office (New York District), 210 Franklin Street, Room 503, Buffalo, New York 14202

Charlotte District Office, 1301 East Morehead Street, Charlotte, North Carolina 28204

Chicago District Office, Federal Building, Room 930A, 536 South Clark Street, Chicago, Illinois 60605

Cincinnati Area Office (Cleveland District), Federal Building, Room 7019, 550 Main Street, Cincinnati, Ohio 45202

Cleveland District Office, 1 Playhouse Square, 1375 Euclid Avenue, Cleveland, Ohio 44115

Dallas District Office, 1900 Pacific Building, 13th Floor, Dallas, Texas 75201

Dayton Area Office (Cleveland District), Federal Building, 200 West 2nd Street, Dayton, Ohio 45402.

Denver District Office, 1531 Stout Street, 6th Floor, Denver, Colorado 80202.

Detroit District Office, First National Building, Suite 600, Detroit, Michigan 48226.

El Paso Local Office (Dallas District) 1st National Building, Suite 1112, 109 North Oregon Street, El Paso, Texas 79903

Fresno Local Office (San Francisco District), 1303 P Street, Suite 103, Fresno, California 93721.

Greensboro Local Office (Charlotte District), Post Office Building, 324 West Market Street, Room B27, Post Office Box 3363, Greensboro, North Carolina 27402

Greenville Local Office (Atlanta District), Bankers Trust Building, 7 North Laurens Street, Suite 1001, Greenville, South Carolina 29601

Houston District Office, 405 Main street, 6th Floor, Houston, Texas 77002

Indianapolis District Office, Federal Building, Room 456, 46 East Ohio Street, Indianapolis, Indiana 46205

Jackson Area Office (Birmingham District) New Federal Building, 100 West Capitol Street, Suite 721, Jackson, Mississippi 39269

Kansas City Area Office (St. Louis District), 911 Walnut Street, 10th Floor, Kansas City, Missouri 64106

Little Rock Area Office (New Orleans District), Savers Building, Room 621, 320 West Capitol Avenue, Little Rock, Arkansas 72201

Los Angeles District Office, 3255 Wilshire Boulevard, 9th Floor, Los Angeles, California 90010.

Louisville Area Office (Memphis District), U.S. Post Office and Courthouse, 601 West Broadway, Room 104, Louisville Kentucky 40202

Memphis District Office, 1407 Union Avenue, Suite 502, Memphis, Tennessee 38104.

Miami District Office, DuPont Plaza Center, Suite 414, 300 Biscayne Boulevard Way, Miami, Florida 33131.

Milwaukee District Office, Henry S. Reuss Federal Plaza, Suite 800, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203

Minneapolis Local Office (Milwaukee District), Federal Building, Room 178, 110 South 4th Street, Minneapolis, Minnesota 55401

Nashville Area Office (Memphis District), Parkway Towers, Suite 1820, Nashville, Tennessee 37219

Newark Area Office (New York District), Military Park Building, 3d Floor, Newark, New Jersey 07102

New Orleans District Office, F. Edward Hébert Federal Building, 600 South Street, New Orleans, Louisiana 70130

New York District Office, 90 Church Street, Room 1501, New York, New York 10007

Norfolk Area Office (Baltimore District), Federal Building, Room 412, 200 Granby Mall, Norfolk, Virginia 23510

Oakland Local Office (San Francisco District), George P. Miller Federal Building, 1515 Clay Street, Oakland, California 94612.

Oklahoma City Area Office (Dallas District), 50 Penn Place, Suite 504, Oklahoma City, Oklahoma 73118

Philadelphia District Office, 127 North 4th, Suite 300, Philadelphia, Pennsylvania 19106.

Phoenix District Office, 135 North Second Avenue, 4th Floor, Phoenix, Arizona 85003

Pittsburgh Area Office (Philadelphia District), Federal Building, Room 2038A, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222.

Raleigh Area Office (Charlotte District), Professional Bldg., Suite 500, 127 W. Hargett, Raleigh, North Carolina 27601

Richmond Area Office (Baltimore District), 400 North 8th Street, Room 6213, Richmond, Virginia 23219.

San Antonio Area Office (Houston District), 727 East Durango, Suite B-601, San Antonio, Texas 78206.

San Diego Local Office (Los Angeles District), San Diego Federal Building, 880 Front Street, San Diego, California 92101.
San Francisco District Office, 10 United Nations Plaza, 4th Floor, San Francisco, California 94102
San Jose Local Office (San Francisco District), Crocker Plaza Building, 84 West Santa Clara, San Jose, California 95113
Seattle District Office, Dexter Horton Building, 710 Second Avenue, Seattle, Washington 98104.
St. Louis District Office, 625 North Euclid Street, 5th Floor, St. Louis, Missouri 63108
Tampa Area Office (Miami District), 700 Twiggs Street, Tampa, Florida 33602.
Washington Area Office (Baltimore District), 1717 H Street, N.W., Suite 402, Washington, D.C. 20006.

[40 FR 8171, Feb. 26, 1975, as amended at 45 FR 40603, June 16, 1980; 49 FR 13024, Apr. 2, 1984]

§ 1610.5 Request for records.

(a) A written request for inspection or copying of a record of the Commission may be presented in person or by mail to the Commission employee designated in § 1610.7. Requests must be presented during business hours on any workday.

(b) Each request must contain information which reasonably describes the records sought and, when known, should contain a name, date, subject matter and location for the record requested in order to permit the record to be promptly located.

(c) Where a request is not considered reasonably descriptive or requires the production of voluminous records, or necessitates the utilization of a considerable number of work hours to the detriment of the business of the Commission, the Commission may require the person making the request or such person's agent to confer with a Commission representative in order to attempt to verify the scope of the request and, if possible, narrow such request.

(d) When a requested record has been identified and is available, the person who made the request will be notified (1) when and where the record will be made available and (2) the cost assessed for processing the request. Fees for the processing of requests will be made in accordance with the schedule set forth in § 1610.15. Checks shall be made payable to the Treasurer of the United States.

§ 1610.6 Records of other agencies.

Requests for records that originated in another Agency and are in the custody of the Commission will be coordinated in appropriate circumstances with that Agency and the person submitting the request shall be so notified. The decision made by that Agency with respect to such records will be honored by the Commission.

[45 FR 40604, June 16, 1980]

§ 1610.7 Where to make request; form.

(a) A request for any of the following types of records shall be submitted to the regional attorney for the appropriate district, area or local at the district office address listed in § 1610.4(c):

(1) information about present or former employees of the district, area orlocal office;

(2) existing statistical data, which is not confidential, relating to the case processing of the district, area or local office;

(3) agreements between the Commission and State or local fair employment agencies under the jurisdiction of the district, area or local office;

(4) materials in district or area office investigative files for charges under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), the Equal Pay Act (29 U.S.C. 206(d)) or the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 *et seq.*).

(b) A request for any record which does not fall within the ambit of subparagraph (a) of this section, or a request for any record the location of which is unknown to the person making the request, shall be submitted in writing to the Associate Legal Counsel, Legal Services, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506.

(c) A request must be clearly and prominently defined as a request for information under the Freedom of Information Act. If submitted by mail, or otherwise submitted under any cover, the envelope or other cover must be similarly identified.

(d) When a request is one which by nature should properly be directed to the Associate Legal Counsel, Legal Services, or a regional attorney, such request shall not be deemed to have been received by the Commission until the time it is actually received by the Associate Legal Counsel or the appropriate regional attorney.

(e) Any Commission official who receives a written Freedom of Information request shall promptly forward it to the appropriate official specified in paragraph (a) or (b) of this section. Any Commission official who receives an oral request under the Freedom of Information Act shall inform the other person making the request that it must be in writing and also inform such person of the provisions of this subpart.

[45 FR 40604, June 16, 1980, as amended at 47 FR 46275, Oct. 18, 1982; 49 FR 13025, Apr. 2, 1984]

§ 1610.8 Authority to determine.

The Associate Legal Counsel, Legal Services, or a regional attorney, when receiving a request pursuant to these regulations, shall grant or deny each such request. The decision of the Associate Legal Counsel or appropriate regional attorney shall be final, subject only to administrative review as provided in § 1610.11 of this subpart.

[45 FR 40604, June 16, 1980, as amended at 47 FR 46275, Oct. 18, 1982; 49 FR 13025, Apr. 2, 1984]

§ 1610.9 Prompt response.

(a) The Associate Legal Counsel, Legal Services, or regional attorney shall either grant or deny a request for records within 10 working days after receipt of the request unless additional time is required for one of the following reasons:

(1) It is necessary to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) It is necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) If it is necessary to consult with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(b) When additional time is required for one of the reasons stated in paragraph (a) of this section the Associate Legal Counsel, Legal Services, or regional attorney, shall acknowledge receipt of the request within the 10 day period and include a brief notation of the reason for the delay and an indication of the date on which it is expected that a determination as to disclosure will be forthcoming.

[45 FR 40604, June 16, 1980, as amended at 47 FR 46275, Oct. 18, 1982]

§ 1610.10 Responses: form and content.

(a) When a requested record has been identified and is available, the Associate Legal Counsel, Legal Services, or appropriate regional attorney, shall notify the person making the request as to where and when the record is available for inspection or that copies will be available. The notification shall also advise the person making the request of any assessed fees under § 1610.15 hereof.

(b) A reply denying a written request for a record shall be in writing signed by the Associate Legal Counsel, Legal Services, or the appropriate regional attorney, and shall include:

(1) His name and title;

(i) A reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record, to the extent consistent with the purpose of the exemption, and a brief explanation of how the exemption applies to the record withheld or (ii) a statement that, after diligent effort, existing requested records have not been found or have not been adequately examined during the time allowed § 1610.9(a), and that the denial will be reconsidered as soon as the search or examination is complete, (iii) a statement that the denial may be appealed to the Commission within 30 days of receipt of the denial or partial denial.

(c) If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the person making the request shall be so notified.

[40 FR 8171, Feb. 26, 1975, as amended at 45 FR 40605, June 16, 1980; 47 FR 46275, Oct. 16, 1982]

§ 1610.11 Appeals to the Commission from initial denials.

(a) When the Associate Legal Counsel, Legal Services, or an appropriate regional attorney, has denied a request for records in whole or in part, the person making the request may appeal within 30 days of its receipt. The appeal must be in writing addressed to the Legal Counsel, Equal Employment Opportunity Commission, 2401 E Street, NW., Washington, D.C. 20507, and clearly labeled as a Freedom of Information Act appeal. Any appeal of a denial in whole or part by a Regional Attorney, must include a copy of the Regional Attorney's determination.

(b) The Legal Counsel shall act upon the appeal within 20 working days of its receipt, and more rapidly if practicable. If the decision is in favor of the person making the request, the decision shall order records promptly made available to the person making the request. The Legal Counsel, may extend the 20 day period in which to render an appeal for that period of time which could have been claimed and consumed by the Associate Legal Counsel, Legal Services, or regional attorney under § 1610.9 but which was either not claimed or consumed in making the initial determination.

(c) The Legal Counsel's decision shall be in writing and signed by the Legal Counsel. A denial in whole or in part of a request on appeal shall set forth the exemption relied on, a brief explanation of how the exemption applied to the records withheld and the reasons for asserting it, if different from that described by the Associate Legal Counsel, Legal Services, or regional attorney under § 1610.10, and that the person making the request may, if dissatisfied with the decision on appeal, file a civil action in the district in which the person resides or has his principal place of business, in the district where the records reside, or in the District of Columbia.

(d) No personal appearance, oral argument or hearing will ordinarily be permitted in connection with an appeal to the Legal Counsel.

(e) On appeal, the Legal Counsel may reduce any fees previously assessed.

[49 FR 48040, Dec. 10, 1984]

§ 1610.13 Maintenance of files.

(a) The Associate Legal Counsel, Legal Services, and regional attorneys, shall maintain files containing all material required to be retained by or furnished to them under this subpart. The material shall be filed by individual request indexed according to the exemptions asserted, and, to the extent feasible, indexed according to the type of records requested.

(b) The Associate Legal Counsel, Legal Services, shall also maintain a file open to the public, which shall contain copies of all grants or denials of appeals by the Commission. The material shall be indexed as stated in paragraph (a) of this section.

[45 FR 40605, June 16, 1980, as amended at 47 FR 46275, Oct. 18, 1982]

§ 1610.14 Waiver of user charges.

(a) Except as provided in paragraph (b) of this section the Associate Legal Counsel, Legal Services, and regional attorneys, shall assess fees for the search and, if necessary, duplication of records requested. They shall also have authority to furnish documents without charge, or at a reduced charge, where they determine that waiver or reduction of the charge is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(b) District and area directors and the librarian are hereby authorized to collect fees for duplication of records which are to be made available for public inspection and copying in the district or area office, or in the headquarters library in accordance with § 1610.4(b). District and area directors and the librarian are hereby authorized to duplicate such records without charge, or at a reduced charge in accordance with the criteria of paragraph (a) of this section.

[45 FR 40605, June 16, 1980, as amended at 47 FR 46275, Oct. 18, 1982]

§ 1610.15 Schedule of fees and method of payment for services rendered.

(a) Except as otherwise provided, the following specific fees shall be applicable with respect to services rendered to members of the public under this subpart:

(1) For actual search time by clerical personnel—at the rate of $7.00 per hour.

(2) For actual search time by professional personnel—at the rate of $17.00 per hour.

(3) For copies made by photocopying machine—$.15 per page (maximum of 10 copies).

(4) For attestation of each record as a true copy—$.75 per document.

(5) For certification of each record as a true copy, under the seal of the agency—$1.00.

(6) For each signed statement of negative result of search for record—$1.00.

(7) All other direct costs of search or duplication shall be charged to the requester in the same amount as incurred by the agency.

(b) While the fees charged for services and copying will in no event exceed those as specified in paragraph (a) of this section, the Commission reserves the right to limit the number of copies that will be provided of any document or to require that special arrangements for copying be made in the case of records or requests presenting unusual problems of reproduction or handling.

(31 U.S.C. 9701)

[40 FR 8171, Feb. 26, 1975, as amended at 43 FR 40223, Sept. 11, 1978; 48 FR 41764, Sept. 19, 1983]

§ 1610.16 Payment of fees.

(a) Unless a person making a request under the Freedom of Information Act states that he or she will bear all assessed fees levied by the Commission in searching for and, where applicable, reproducing requested data, said person will be held liable for assessed fees not to exceed $50.00. A request which the Commission expects to exceed $50.00 and which does not state acceptance of responsibility for all assessed fees will not be deemed to have been received until the person making the request is promptly advised of the anticipated fees and agrees to bear them.

(b) A search fee will be assessable notwithstanding that no records responsive to the request or that no records not exempt from disclosure are found.

(c) Fees must be paid in full prior to issuance of requested copies of records. The Commission will inform the person making the request of the exact amount of the assessed fees at the time of granting or denying the request.

§ 1610.17 Exemptions.

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in 552(b). These categories include such matters as national defense and foreign policy information, investigatory files, internal procedures and communications, materials exempted from disclosure by other statutes, information given in confidence, and matters involving personal privacy.

(b) Section 706(b) of title VII provides that the Commission shall not make public charges which have been filed. It also provides that (subsequent to the filing of a charge, an investigation, and a finding that there is reasonable cause to believe that the charge is true) nothing said or done during and as a part of the Commission's endeavors to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion may be made public by the Commission without the written consent of the parties concerned; nor may it be used as evidence in a subsequent proceeding. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of section 706(b) shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than 1 year.

(c) Section 709 of title VII authorizes the Commission to conduct investigations of charges filed under § 706, engage in cooperative efforts with State and local agencies charged with the administration of State or local fair employment practices laws, and issue regulations concerning reports and record-keeping. Section (e) of section 709 provides that it shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under section 709 prior to the institution of any proceeding under the act involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of section 709(e) shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than 1 year.

(d) Special disclosure rules apply to the case files for charging parties, aggrieved persons on whose behalf a charge has been filed, and entities against whom charges have been filed. The special disclosure rules are available in the public reading areas of the Commission. Under sections 706 and 709, case files involved in the administrative process of the Commission are not available to the public.

(e) Each executed statistical reporting form required under Part 1602 of this Chapter, such as Employer Information Report EEO-1, etc., relating to a particular employer is exempt from disclosure to the public prior to the institution of a proceeding under title VII involving information from such form.

(f) Requests for information relating to open case files covering alleged violations of the Equal Pay Act (29 U.S.C. 206(b)) or the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 *et seq.*) will ordinarily be denied under the seventh exemption of the Freedom of Information Act as investigatory records compiled for law enforcement purposes.

(g) The medical, financial, and personnel files of employees of the Commission are exempt from disclosure to the public.

[40 FR 8171, Feb. 26, 1975, as amended at 45 FR 40605, June 16, 1980]

§ 1610.18 Information to be disclosed.

The Commission will provide information to the public in the following matters:

(a) The Commission will make available for inspection and copying some tabulations of aggregate industry, area, and other statistics derived from the Commission's reporting programs authorized by section 709(c) of title VII where such tabulations have been previously compiled by the Commission and are available in documentary form, to the extent that such tabulations do not consist of aggregate data from less than three responding entities, and do not reveal the identity of an individual or the dominant entity in a particular industry or area in any manner.

(b) All blank forms utilized by the Commission.

(c) All signed contracts, final bids on all signed contracts, and agreements between the Commission and State or local agencies charged with the administration of State or local fair employment practices laws.

(d) All final reports which do not utilize statutorily confidential material in discernible individual form.

(e) All agency correspondence to members of the public, Members of Congress, or other persons not government employees or special government employees, except for matters the making public of which would constitute an invasion of privacy.

(f) All administrative staff manuals and instructions to Staff that affect a member of the public unless the materials are promptly published and copies offered for sale.

(g) All final votes of each Commissioner, for every Commission meeting, except for votes pertaining to the filing of suit against respondents until such time as litigation is actually commenced.

§ 1610.19 Deletion of exempted matters.

Where requested records contain matters which are exempted under 5 U.S.C. 552(b) but which matters are reasonably segregable from the remainder of the records, they shall be disclosed by the Commission with deletions. To each such record the Com-

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mission shall attach a written justification for making deletions. A single such justification shall suffice for deletions made in a group of similar or related records.

§ 1610.20 Annual report.

The Legal Counsel shall, on or before March 1, 1975, and annually thereafter, submit a Freedom of Information Act report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate. The report shall include those matters required by 5 U.S.C. 552 (d).

[40 FR 3171, Feb. 26, 1985, as amended at 47 FR 46275, Oct. 18, 1982]

Subpart B—Production in Response to Subpenas or Demands of Courts or Other Authorities

AUTHORITY: Sec. 713(a), 78 Stat. 265; 42 U.S.C. 2000e-12, 5 U.S.C. 552

SOURCE: 32 FR 16261, Nov. 29, 1967, unless otherwise noted.

§ 1610.30 Purpose and scope.

This subpart contains the regulations of the Commission concerning procedures to be followed when a subpena, order, or other demand (hereinafter in this subpart referred to as a "demand") of a court or other authority is issued for the production or disclosure of (a) any material contained in the files of the Commission; (b) any information relating to material contained in the files of the Commission; or (c) any information or material acquired by any person while such person was an employee of the Commission as a part of the performance of his official duties or because of his official status.

§ 1610.32 Production prohibited unless approved by the Legal Counsel.

No employee or former employee of the Commission shall, in response to a demand of a court or other authority, produce any material contained in the files of the Commission or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without the prior approval of the Legal Counsel.

[32 FR 16261, Nov. 29, 1967, as amended at 47 FR 46275, Oct. 18, 1982]

§ 1610.34 Procedure in the event of a demand for production or disclosure.

(a) Whenever a demand is made upon an employee or former employee of the Commission for the production of material or the disclosure of information described in § 1610.30, he shall immediately notify the Legal Council. If possible, the Legal Counsel shall be notified before the employee or former employee concerned replies to or appears before the court or other authority.

(b) If response to the demand is required before instructions from the Legal Counsel are received, an attorney designated for that purpose by the Commission shall appear with the employee or former employee upon whom the demand has been made, and shall furnish the court or other authority with a copy of the regulations contained in this part and inform the court or other authority that the demand has been or is being, as the case may be, referred for prompt consideration by the Legal Counsel. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested instructions from the Legal Counsel.

[32 FR 16261, Nov. 29, 1967, as amended at 47 FR 46275, Oct. 18, 1982]

§ 1610.36 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 1610.34(b) pending receipt of instructions from the Legal Counsel, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the Legal Counsel not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand (United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951)).

[32 FR 16261, Nov. 29, 1967, as amended at 47 FR 46275, Oct. 18, 1982]

PART 1611—PRIVACY ACT REGULATIONS

Sec.

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AUTHORITY: 5 U.S.C. 552a.

SOURCE: 42 FR 7949, Feb. 8, 1977, unless otherwise noted.

§ 1611.1 Purpose and scope.

This part contains the regulations of the Equal Employment Opportunity Commission (Commission) implementing the Privacy Act of 1974, 5 U.S.C. 552a. It sets forth the basic responsibilities of the Commission with regard to the Commission's compliance with the requirements of the Privacy Act (the Act) and offers guidance to members of the public who wish to exercise any of the rights established by the Act with regard to records maintained by the Commission. Those Commission records which are contained in the government wide systems of personnel records, of which notices have been published by the Civil Service Commission, are subject to the Civil Service Commission's Privacy Act Regulations, 5 CFR Part 297. Where Civil Service Commission Privacy Act notices permit access to these records through the employing agency, the individual should submit requests for access or for an accounting of disclosures to the Commission offices as described in § 1611.3(b) below.

§ 1611.2 Definitions.

For purposes of this part, the terms "individual," "maintain," "record," and "system of records" shall have the meanings set forth in 5 U.S.C. 552a

§ 1611.3 Procedures for requests pertaining to individual records in a record system.

(a) Any person who wishes to be notified if a system of records maintained by the Commission contains any record pertaining to him or her, or to request access to such records or to an accounting of disclosures made of such records, shall submit a written request, either in person or by mail, in accordance with the instructions set forth in the system notice:

(1) The name of the individual making the request;

(2) The name of the system of records (as set forth in the system notice to which the request relates);

(3) Any other information specified in the system notice; and

(4) When the request is one for access, a statement as to whether the requester desires to make a personal inspection of the records, or be supplied with copies by mail.

(b) Requests pertaining to personnel records contained in system CSC/GOVT-1 (Appeals, Grievances and Complaints Records) of which notice has been published by the Civil Service Commission in the FEDERAL REGISTER should be directed to the Director, Personnel Management Services, Washington, D.C. 20506. Requests pertaining to personnel records contained in system CSC/GOVT-2 (Confidential Employment and Financial Interest Statements) should be directed to the Office of Legal Counsel, U.S. Civil Service Commission, Washington, D.C. 20415, or the Office of Legal Counsel, EEOC, Washington, D.C. 20506. Requests pertaining to personnel records contained in systems CSC/GOVT-3 (General Personnel Records) and CSC/GOVT-5 (Recruiting, Examining and Placement Records) should be directed to Commission offices as follows:

(1) For present Commission employees of GS-13 and lesser grade or non-General Schedule employees of equivalent grade, whose normal duty station is a District, Area or Local of the Commission, requests may be directed to the District Director having jurisdiction over the duty station. The locations of the District Offices are set forth in 29 CFR 1610.4(c).

(2) For all other present Commission employees, requests shall be directed to the Director, Personnel Management Services, Washington, D.C. 20506.

(3) For all former Commission employees, requests for access to government-wide system CSC/GOVT-3 (General Personnel Records) shall be directed to the National Personnel Records Center, General Services Administration, St. Louis, Missouri 63118.

(c) Any person whose request for access under paragraph (a) of this section is denied, may appeal that denial in accordance with § 1611.5(c).

[42 FR 7949, Feb. 8, 1977, as amended at 47 FR 46275, Oct. 18, 1982; 49 FR 13025, Apr. 2, 1984]

§ 1611.4 Times, places, and requirements for identification of individuals making requests.

(a) If a person submitting a request for access under § 1611.3 has asked that the Commission authorize a personal inspection of records pertaining to that person, and the appropriate Commission official has granted that request the requester shall present himself or herself at the time and place specified in the Commission's response or arrange another, mutually convenient time with the appropriate Commission official.

(b) Prior to inspection of the records, the requester shall present sufficient personal identification (e.g., driver's license, employee identification card, social security card, credit cards). If the requester is unable to provide such identification, the requester shall complete and sign in the presence of a Commission official a signed statement asserting his or her identity and stipulating that he or she understands that knowingly or willfully seeking or obtaining access to records about another individual under false pretenses is a misdemeanor punishable by fine up to $5,000.

(c) Any person who has requested access under § 1611.3 to records through personal inspection, and who wishes to be accompanied by another person or persons during this inspection, shall submit a written statement authorizing disclosure of the record in such person's or person's presence.

(d) If an individual submitting a request by mail under § 1611.3 wishes to have copies furnished by mail, he or she must include with the request a signed and notarized statement asserting his or her identity and stipulating that he or she understands that knowingly or willfully seeking or obtaining access to records about another individual under false pretenses is a misdemeanor punishable by fine up to $5,000.

(e) A request filed by the parent of any minor or the legal guardian of any incompetent person shall: state the relationship of the requester to the individual to whom the record pertains; present sufficient identification; and, if not evident from information already available to the Commission, present appropriate proof of the relationship or guardianship.

(f) A person making a request pursuant to a power of attorney must possess a specific power of attorney to make that request.

(g) No verification of identity will be required where the records sought are publicly available under the Freedom of Information Act.

§ 1611.5 Disclosure of requested information to individuals.

(a) Upon receipt of request for notification as to whether the Commission maintains a record about an individual and/or request for access to such record:

(1) The appropriate Commission official shall acknowledge such request in writing within 10 working days of receipt of the request. Wherever practicable, the acknowledgement should contain the notification and/or determination required in paragraph (a)(2) of this section.

(2) The appropriate Commission official shall provide, within 30 working

days of receipt of the request, written notification to the requester as to the existence of the records and/or a determination as to whether or not access will be granted. In some cases, such as where records have to be recalled from the Federal Records Center, notification and/or a determination of access may be delayed. In the event of such a delay, the Commission official shall inform the requester of this fact, the reasons for the delay, and an estimate of the date on which notification and/or a determination will be forthcoming.

(3) If access to a record is granted the determination shall indicate when and where the record will be available for personal inspection. If a copy of the record has been requested, the Commission official shall mail that copy or retain it at the Commission to present to the individual, upon receipt of a check or money order in an amount computed pursuant to § 1611.11.

(4) When access to a record is to be granted, the appropriate Commission official will normally provide access within 30 working days of receipt of the request unless, for good cause shown, he or she is unable to do so, in which case the requester shall be informed within 30 working days of receipt of the request as to those reasons and when it is anticipated that access will be granted.

(5) The Commission shall not deny any request under § 1611.3 concerning the existence of records about the requester in any system of records it maintains, or any request for access to such records, unless that system is exempted from the requirements of 5 U.S.C. 552a in § 1611.13 or § 1611.14.

(6) If the Commission receives a request pursuant to § 1611.3 for access to records in a system of records it maintains which is so exempt, the appropriate Commission official shall deny the request.

(b) Upon request, the appropriate Commission official shall make available an accounting of disclosures pursuant to 5 U.S.C. 552a(c)(3).

(c) If access to a record is denied pursuant to paragraphs (a)(2) or (b) of this section, the determination shall specify the reasons therefor, and shall advise the individual that he or she may appeal that denial in writing to the Chairman Equal Employment Opportunity Commission, Washington, D.C. 20506, if the request was for access to a system designated as an EEOC system of records. An appeal from a denial of access to a government-wide system of records, CSC/GOVT 1-5, shall be made to the Director, Bureau of Manpower Information Systems, U.S. Civil Service Commission, Washington, D.C. 20415 (see 5 CFR 297.113). When taking an appeal, the requester should clearly label the envelope "Personal Information Access Appeal."

(d) In the event that upon an appeal under paragraph (c) of this section, access to a record is denied by the Chairman, the Chairman shall advise the individual of his or her right to bring a civil action in federal district court to seek review of the denial in accordance with 5 U.S.C. 552a(g).

(e) Nothing in 5 U.S.C. 552a or this Part allows an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

§ 1611.6 Special procedures: Medical records.

In the event the Commission receives a request pursuant to § 1611.3 for access to medical records (including psychological records) whose disclosure of which the appropriate Commission official determines could be harmful to the individual to whom they relate, he or she may refuse to disclose the records directly to the requester but shall transmit them to a physician designated by that individual.

§ 1611.7 Request for correction or amendment to record.

(a) Any person who wishes to request correction or amendment of any record pertaining to him or her which is contained in a system of records maintained by the Commission, shall submit that request in writing in accordance with the instructions set forth in the system notice for that system of records. If the request is submitted by mail, the envelope should be clearly labeled "Personal Information Amendment." The request shall include:

(1) The name of the individual making the request;

(2) The name of the system of records as set forth in the system notice to which the request relates;

(3) A description of the nature (e.g., modification, addition or deletion) and substance of the correction or amendment requested; and

(4) Any other information specified in the system notice.

(b) Any person submitting a request pursuant to paragraph (a) of this section shall include sufficient information in support of that request to allow the Commission to apply the standards set forth in 5 U.S.C. 552a (e).

(c) All requests to amend pertaining to personnel records described in § 1611.3(b) shall conform to the requirements of paragraphs (a) and (b) of this section and may be directed to the appropriate officials as indicated in § 1611.3(b). Such requests may also be directed to the system manager specified in the Civil Service Commission's systems notices.

(d) Any person whose request under paragraph (a) of this section is denied may appeal that denial in accordance with § 1611.9(a).

§ 1611.8 Agency review of request for correction or amendment to record.

(a) When the Commission receives a request for amendment or correction under § 1611.7(a), the appropriate Commission official shall acknowledge that request in writing within 10 working days of receipt. He or she shall promptly either:

(1) Determine to grant all or any portion of a request for correction or amendment; and:

(i) Advise the individual of that determination,

(ii) Make the requested correction or amendment; and

(iii) Inform any person or agency outside the Commission to whom the record has been disclosed, and where an accounting of that disclosure is maintained in accordance with 5 U.S.C. 552a(c), of the occurrence and substance of the correction or amendments, or;

(2) Inform the requester of the refusal to amend the record in accordance with the request; the reason for the refusal; and the procedures whereby the requester can appeal the refusal to the Chairman of the Commission.

(b) If the Commission official informs the requester of the determination within the 10-day deadline, a separate acknowledgement is not required.

(c) In conducting the review of a request for correction or amendment, the Commission official shall be guided by the requirements of 5 U.S.C. 552a(e).

(d) In the event that the Commission receives from the agency which maintains the record a notice of correction or amendment to information in a record contained in a system of records which it maintains, it shall comply with paragraph (a)(1) of this section in the same manner as if the Commission itself had made the original correction or amendment.

(e) Requests for amendment or correction of records maintained in the government-wide systems for which notices have been published by the Civil Service Commission shall be governed by § 297.112 of the CSC Privacy Act regulations, 5 CFR 297.

§ 1611.9 Appeal of initial adverse agency determination on correction or amendment.

(a) If the appropriate Commission official determines not to grant all or any portion of a request for correction or amendment, the requester may appeal this determination in writing to the Chairman, Equal Employment Opportunity Commission, Washington, D.C. 20506. When taking such an appeal, the requester should clearly label the envelope "Personal Information Amendment Appeal." With respect to the personnel records maintained in the government-wide systems of records for which notices were published by the Civil Service Commission, the appeal of a Commission decision pertinent thereto shall be made to the Director, Bureau of Manpower

Information Systems, U.S. Civil Service Commission, Washington, D.C. 20415. The Civil Service Commission Privacy Act regulations, 5 CFR 297.113, shall govern said appeals.

(b) The Chairman shall make a final determination with regard to an appeal submitted under paragraph (a) of this section not later than 30 working days from the date on which the individual requests a review, unless for good cause shown, the Chairman extends this 30-day period and so notifies the requester together with an estimate of the date on which a final determination will be made. The authority to extend this period may not be delegated. Such extension should be utilized only in exceptional circumstances and should not normally exceed 30 days.

(c) In conducting the review of an appeal submitted under paragraph (a) of this section, the Chairman shall be guided by the requirements of 5 U.S.C. 552a(e).

(d) If the Chairman determines to grant all or any portion of a request on an appeal submitted under paragraph (a) of this section, he or she shall so inform the requester, and the appropriate Commission official shall comply with the procedures set forth in § 1611.8(a)(1) (ii) and (iii).

(e) If the Chairman determines in accordance with paragraphs (b) and (c) of this section not to grant all or any portion of a request on an appeal submitted under paragraph (a) of this section, he or she shall inform the requester:

(1) Of this determination and the reasons therefor;

(2) Of the requester's right to file a concise statement of reasons for disagreement with the determination of the Chairman;

(3) That such statements of disagreement will be made available to anyone to whom the record is subsequently disclosed, together with (if the Commission deems it appropriate) a brief statement summarizing the Commission's reasons for refusing to amend the record;

(4) That prior recipients of the disputed record will be provided with a copy of the statement of disagreement together with (if the Commission deems it appropriate) a brief statement of the Commission's reasons for refusing to amend the record, to the extent that an accounting of disclosures is maintained under 5 U.S.C. 552a(c); and

(5) Of the requester's right to file a civil action in federal district court to seek a review of the Chairman's determination, in accordance with 5 U.S.C. 552a(g).

(f) The Chairman shall ensure that any statements of disagreement submitted by a requester are handled in accordance with paragraphs (e)(3) and (4) of this section.

§ 1611.10 Disclosure of record to person other than the individual to whom it pertains.

The Commission shall not disclose any record which is contained in a system of records it maintains, by any means of communication to any person or to another agency, except pursuant to a written request by, or with the prior written consent of the individual to whom the record pertains, unless the disclosure is authorized by one or more provisions of 5 U.S.C. 552a(b).

§ 1611.11 Fees.

(a) No fee shall be charged for searches necessary to locate records. No charge shall be made if the total fees authorized are less than $1.00. Fees shall be charged for services rendered under this part as follows:

(1) Copies made by photocopy device or otherwise (per page), $.05.

(2) Attestation of each record as a true copy, $.75.

(3) Certification of each record as a true copy under the seal of the Commission, $1.00.

(b) All required fees shall be paid in full prior to issuance of requested copies of records. Fees are payable to "Treasurer of the United States."

§ 1611.12 Penalties.

The criminal penalties which have been established for violations of the Privacy Act of 1974 are set forth in 5 U.S.C. 552a(i). Penalties are applicable to any officer or employee of the Commission; to contractors and employees of such contractors who enter into contracts with the Commission on or after September 27, 1975, and who are considered to be employees of the Commission within the meaning of 5 U.S.C. 552a(m); and to any person who knowingly and willfully requests or obtains any record concerning an individual from the Commission under false pretenses.

§ 1611.13 General Exemptions. [Reserved]

§ 1611.14 Specific Exemptions.

Pursuant to subsection (k)(2) of the Act, 5 U.S.C. 552a(k)(2), System EEOC-3, Charge of Discrimination Case Files is exempt from subsections (c)(3), (d), (e)(1), (e)(4), (G), (H), and (I), and (f) of the Act. System EEOC-1, Age and Equal Pay Act Discrimination Case Files is exempt from subsections (c)(3), (d), (e)(1), (e)(4)(H), and (f) of the Act. The Commission has determined to exempt these systems from the above named provisions of the Privacy Act for the following reasons:

(a) The files in these systems contain information obtained by the Commission in the course of investigations of charges and complaints that violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, the Age Discrimination in Employment Act of 1967, as amended 29 U.S.C. 621, *et seq.*, and the Equal Pay Act of 1963, as amended, 29 U.S.C. 206(d), have occurred. As a part of its investigations, the Commission often obtains information regarding unlawful employment practices other than those complained of by the subject individual of the file. Therefore, it would impede the law enforcement activities of the Commission for it to be restricted to maintaining in an individual's case file only information which is relevant and necessary to the subject individual's allegations.

(b) The subject individuals of the case files in these systems know that the Commission is maintaining a file on their charges or complaints, and the general nature of the information contained therein.

(c) The subject individuals of the case files in systems EEOC-1 and EEOC-3, have been provided a means of access to their records by the Commission's Freedom of Information Act Regulations, 29 CFR Part 1610. Subject individuals of the case files in System EEOC-3 have also been provided a means of access to their records by section 83 of the Commission's Compliance Manual.

(d) The Commission has determined that the nonexemption of these systems from the above named subsection of the Privacy Act would impede the agency's law enforcement efforts.

[47 FR 18595, Apr. 30, 1982]

PART 1612—GOVERNMENT IN THE SUNSHINE ACT REGULATIONS

Sec.

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AUTHORITY: 5 U.S.C. 552b, sec. 713, 78 Stat. 265; 42 U.S.C. 2000e-12.

SOURCE: 42 FR 13330, Mar. 14, 1977, unless otherwise noted.

§ 1612.1 Purpose and scope.

This part contains the regulations of the Equal Employment Opportunity Commission (hereinafter, the Commission) implementing the Government in the Sunshine Act of 1976, 5 U.S.C. 552b, which entitles the public to the fullest practicable information regarding the decision-making processes of the Commission. The provisions of this part set forth the basic responsibilities of the Commission with regard to the Commission's compliance with the requirements of the Sunshine Act and offers guidance to members of the public who wish to exercise any of the rights established by the Act.

§ 1612.2 Definitions.

The following definitions apply for purposes of this part:

(a) The term "agency" means the Equal Employment Opportunity Commission and any subdivision thereof authorized to act on its behalf.

(b) The term "meeting" means the deliberations of at least three of the members of the agency, which is a quorum of Commissioners, where such deliberations determine or result in the joint conduct or disposition of official agency business (including conference calls), but does not include:

(1) Individual members' consideration of official agency business circulated to the members in writing for disposition by notation or other separate, sequential consideration of Commission business by Commissioners,

(2) Deliberations to decide whether a meeting or portion(s) of a meeting or series of meetings should be open or closed,

(3) Deliberations to decide whether to withhold from disclosure information pertaining to a meeting or portions of a meeting or a series of meetings, or

(4) Deliberations pertaining to any change in any meeting or to changes in the public announcement of such meeting.

(c) The term "member" means each Commissioner of the agency.

(d) The term "entire membership" means the number of members holding office at the time of the meeting in question.

(e) The term "person" means any individual, partnership, corporation, association, or public or private organization.

(f) The term "public observation" means attendance at any meeting open to the public but does not include participation, or attempted participation, in such meeting in any manner.

§ 1612.3 Open meeting policy.

(a) All meetings of the Commission shall be conducted in accordance with the provisions of this part.

(b) Except as otherwise provided in § 1612.4, every portion of every meeting shall be open to public observation. Public observation does not include participation or disruptive conduct by observers. Any attempted participation or disruptive conduct by observers shall be cause for removal of persons so engaged at the discretion of the presiding member of the agency.

(c) When holding open meetings, the Commission shall provide ample space, sufficient visibility, and adequate acoustics for persons in attendance at the meeting.

(d) Observers may take still photographs and use portable sound recorders which do not require electrical outlets. Persons may take pictures only at the beginning of a meeting and may not use flash equipment. Permission to use non-battery operated sound recorders and visual recorders must be sought reasonably in advance of a meeting. Such request must be made in writing to the Commission through the Office of the Executive Secretariat. The Commission may permit such activities to be conducted under specified limitations which insure proper decorum and minimum interference with the meeting. In all cases, audio or visual recording shall not disrupt or otherwise impede the meeting.

§ 1612.4 Exemptions to open meeting policy.

Except in a case where the agency finds that the public interest requires otherwise, the provisions of § 1612.3 shall not apply to any meeting or portion of a meeting or portion of a meeting where the agency determines that an open meeting or the disclosure of information from such meeting or portions of a meeting is likely to:

(a) Disclose matters that are (1) specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and (2) in fact properly classified pursuant to such Executive Order;

(b) Relate solely to the internal personnel rules and practices of the agency;

(c) Disclose matters specifically exempted from disclosure by statute (other than the Freedom of Information Act, 5 U.S.C. 552), provided that such statute (1) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (2) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(d) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Involve accusing any person of a crime or formally censuring any person;

(f) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(g) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (1) interfere with enforcement proceedings, (2) deprive a persons of a right to a fair trial or an impartial adjudication, (3) constitute an unwarranted invasion of personal privacy, (4) disclose the identity of a confidential source, and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (5) disclose investigative techniques and procedures, or (6) endanger the life of physical safety of law enforcement personnel;

(h) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(i) Disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action, except where the agency has already disclosed to the public the content or nature of the disclosed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(j) Specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures specified in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

§ 1612.5 Closed meeting procedures; agency initiated requests.

(a) Any member of the agency, the Legal Counsel, or any other Commission official submitting an agenda item for the subject meeting may request that any meeting or portion thereof be closed to public observation for any of the reasons provided in § 1612.4 of this part by submitting a request in writing to the Commission through the Office of the Executive Secretariat no later than fourteen (14) calendar days prior to the meeting.

(b) Upon receipt of any request made under paragraph (a) of this section, the Executive Secretary shall submit the request to the Legal Counsel for certification in accordance with § 1612.9 of this part.

(c) No later than seven (7) calendar days prior to the scheduled meeting the members of the agency shall, upon consideration of the request submitted and consideration of the certified opinion of the Legal Counsel, determine by recorded vote whether to close the meeting or portion of the meeting to public observation. The members may vote less than seven days prior to the scheduled meeting where:

(1) A majority of the members of the Commission determines by recorded vote that agency business requires that any such meeting or series of meetings be held at an earlier date.

(2) A meeting is closed under the Commission's regulation as set forth in § 1612.13(a) of this part.

(3) A meeting is closed pursuant to a request made under § 1612.6 of this

part and submitted less than seven days prior to the meeting.

(4) There is a need to change the subject matter or the determination to open or close a meeting previously announced.

(d) The Commissioner shall, at the same time, vote on whether to withhold any information pertaining to the meeting and otherwise required to be announced (§ 1612.7(a)(3)) or made publicly available (paragraphs (f)(2) and (3) of this section).

(e) A meeting, portion of a meeting, or series of meetings may be closed to public observation only when a majority of the entire agency membership votes to take such action. Information pertaining to a meeting, portion of a meeting or series of meetings otherwise required to be announced (§ 1612.7(a)(3)) or made publicly available (paragraphs (f)(2) and (3) of this section) shall be withheld only when a majority of the entire agency membership votes to take such action.

(f) With respect to each vote taken on whether a meeting should be open or closed, the agency shall, within one day of such vote, make publicly available the following information:

(1) A written copy of the vote of each participating Commission member on the question.

(2) A written explanation of Commission action closing a meeting or portions thereof, and

(3) The name and affiliation of any persons who are expected to attend a closed meeting.

(g) The agency shall, within one day, make publicly available the vote of each Commission member on whether or not to withhold any of the information described in paragraphs (f)(2) or (3) of this section.

(h) A separate vote shall be taken for each meeting proposed to be closed to the public and with respect to any information proposed to be withheld from the public. However, a single vote may be taken with respect to a series of meetings proposed to be closed to the public, and with respect to information concerning such series of meetings, if each meeting involves the same particular matters and is scheduled to be held no later than thirty (30) calendar days after the first meeting in the series.

[42 FR 13830, Mar. 14, 1977, as amended at 47 FR 46276, Oct. 18, 1982]

§ 1612.6 Closed meeting procedures: request initiated by an interested person.

(a) Any person as defined in § 1612.2 of this part whose interest may be directly affected by a portion of a meeting may request that the agency close that portion of the meeting to the public for any of the reasons listed in § 1612.4(e), (f) or (g).

(b) Any person described in paragraph (a) of this section who submits a request that a portion of a meeting be closed, shall submit such request to the Chairman of the agency at the following address: the Equal Employment Opportunity Commission, 2401 E Street N.W., Washington, D.C., 20506. Such person shall state with particularity that portion of a meeting sought to be closed and the reasons for such request.

(c) The Chairman, upon receipt of any request made under paragraph (a) of this section, shall furnish a copy of the request to:

(1) Each member of the agency.

(2) The Legal Counsel for certification in accordance with § 1612.9 of this part.

(d) Any member of the agency may request agency action upon such request.

(e) The Commission shall, upon the request of any one of its members and consideration of the certified opinion of the Legal Counsel, determine by recorded vote whether to close such meeting or portion thereof.

(f) The Chairman of the Commission shall promptly communicate to any person making a request to close a meeting or portion of a meeting under this section the agency's final disposition of such request.

[42 FR 13830, Mar. 14, 1977, as amended at 47 FR 46276, Oct. 18, 1982]

§ 1612.7 Public announcement of agency meetings.

(a) Public announcement of each meeting by the agency shall be accomplished by recorded telephone message at telephone number 202-634-6748 (between the hours of 9 a.m. and 5 p.m. e.t.), and by posting such announcement on the agency's bulletin board located near the entrance of the 2nd Floor of the Columbia Plaza Building at 2401 E Street NW., Washington, D.C. 20506, not later than one week prior to commencement of a meeting or the commencement of the first meeting in a series of meetings, except as otherwise provided in this section, and shall disclose:

(1) The time of the meeting.

(2) The place of the meeting.

(3) The subject matter of each portion of each meeting or series of meetings.

(4) Whether any portion(s) of a meeting will be open or closed to public observation.

(5) The name and telephone number of an official designated to respond to requests for information about the meeting.

(b) Where a meeting is closed to the public, the agency may withhold and not announce the information specified in paragraph (a)(3) of this section, if and to the extent that it finds that such action is justified under § 1612.4. Information shall be withheld only by a recorded vote of a majority of the entire membership of the agency.

(c) The announcement described in paragraph (a) of this section may be accomplished less than one week prior to the commencement of any meeting or series of meetings where:

(1) A majority of the members of the Commission determines by recorded vote that agency business requires that any such meeting or series of meetings be held at an earlier date.

(2) A meeting is closed under the Commission's regulation as set forth in § 1612.13(a) of this part.

(3) A meeting is closed pursuant to a request made under § 1612.6 of this Part and submitted less than seven days prior to the meeting.

(4) There has been a change in the subject matter or determination to open or close a meeting previously announced.

In these instances, the agency shall make public announcement at the earliest practicable time.

(d) Immediately following any public announcement accomplished under the provisions of this section, the agency shall submit a notice for publication in the FEDERAL REGISTER disclosing:

(1) The time of the meeting.

(2) The place of the meeting.

(3) The subject matter of each portion of each meeting or series of meetings.

(4) Whether any portion(s) of a meeting will be open or closed to public observation.

(5) The name and telephone number of an official designated to respond to requests for information about the meeting.

§ 1612.8 Public announcement of changes in meetings.

(a) The agency is required to make a public announcement of any changes in its meeting or portion(s) thereof. If, after the announcement provided for in § 1612.7, the time or place of a meeting is changed or the meeting is cancelled, the agency will announce the change at the earliest practicable time. The subject matter or the determination to open or close the meeting may be changed only if (1) a majority of the entire membership of the agency determines by recorded vote that agency business so requires and that no earlier announcement of the change was possible and (2) the agency publicly announces the change and the vote of each member upon such change at the earliest practicable time.

(b) Immediately following any public announcement of any change accomplished under the provisions of this section, the agency shall submit a notice for publication in the FEDERAL REGISTER disclosing:

(1) The time of the meeting.

(2) The place of the meeting.

(3) The subject matter of each portion of each meeting or series of meetings.

(4) Whether any portion(s) of a meeting is open or closed to public observation.

(5) Any change in (b) (1), (2), (3), or (4) of this section.

(6) The name and telephone number of the official designated to respond to

requests for information about any meeting.

§ 1612.9 Legal Counsel's certification in closing a meeting.

(a) Upon any proper request made pursuant to this part, that the agency close a meeting or portion(s) thereof, the Legal Counsel shall certify in writing to the agency, whether in his or her opinion the closing of a meeting or portion(s) thereof is proper under the provisions of this part and the terms of the Government in the Sunshine Act (5 U.S.C. 552b). If, in the opinion of the Legal Counsel, a meeting or portion(s) thereof is proper for closing under this part and the terms of the Government in the Sunshine Act, his or her certification of that opinion shall cite each applicable particular exemption of that Act and provision of this part.

(b) A copy of the certification of the Legal Counsel as described in paragraph (a) of this section together with a statement of the presiding officer of the meeting setting forth the time and place of the relevant meeting or meetings, and the persons present, shall be maintained by the agency in a public file.

[42 FR 13830, Mar. 14, 1977, as amended at 47 FR 46276, Oct. 18, 1982]

§ 1612.10 Recordkeeping requirements.

(a) In the case of any meeting or portion(s) thereof to be closed to public observation under the provisions of this part, the following records shall be maintained by the Executive Secretary of the agency:

(1) The certification of the Legal Counsel pursuant to § 1612.9 of this part;

(2) A statement from the presiding officer of the meeting or portion(s) thereof setting forth the time and place of the meeting, and the persons present;

(3) A complete electronic recording adequate to record fully the proceedings of each meeting closed to the public observation, except that in a meeting closed pursuant to paragraph (h) or (j) of § 1612.4, the agency may maintain minutes in lieu of a recording. Such minutes shall fully, and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any roll call vote. All documents considered in connection with any item shall be identified in the minutes.

(b) If the agency has determined that the meeting or portion(s) thereof may properly be closed to the public, the electronic recording or minutes shall not be made available to the public until such future time, if any, as it is determined by the Commission upon request, that the reasons for closing the meeting no longer pertain; Provided, however, that any separable portion of a recording or minutes will be made promptly available to the public if that portion does not contain information properly withheld under § 1612.4.

(c) The agency shall maintain a copy of the electronic recording or minutes for a period of two years after the meeting, or until one year after the conclusion of the proceeding to which the meeting relates, whichever occurs later.

[42 FR 13830, Mar. 14, 1977, as amended at 47 FR 46276, Oct. 18, 1982]

§ 1612.11 Public access to records.

All requests for information shall be submitted in writing to the Chairman of the agency. Requests to inspect or copy the electronic recordings or minutes of agency meetings or portions thereof will be considered under the provisions of § 1612.4 of this part.

§ 1612.12 Fees.

(a) Records provided to the public under this part shall be furnished at the expense of the party requesting copies of the recording or minutes, upon payment of the actual cost of duplication.

(b) All required fees shall be paid in full prior to issuance of requested copies of records. Fees are payable to the "Treasurer of the United States."

§ 1612.13 Meetings closed by regulation.

(a) This paragraph constitutes the Commission's regulation promulgated pursuant to paragraph (d)(4) of the

Government in the Sunshine Act and may be invoked by the agency to close meetings or portions thereof where the subject matter of such meeting or portion of a meeting is likely to involve:

(1) Matters pertaining to the issuance of subpoenas;

(2) Subpoena modification and revocation requests, and

(3) The Agency's participation in civil actions or proceedings pertaining thereto.

(b) When closing a meeting or portion thereof under the Commission's regulation set forth in paragraph (a) of this section, a majority of the Commission membership shall vote at or before the beginning of such meeting or portion thereof to do so. The vote to close a meeting by regulation shall be recorded and made publicly available.

(c) The Commission's determination to promulgate the regulation in paragraph (a) of this section is based upon a review of the agenda of Commission meetings for the two years prior to the promulgation of these regulations.

(1) Since the Commission's practice of conducting weekly meetings began in 1975, proposed litigation against Title VII respondents has been a regular agenda item. The tenth exemption of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(10), exempts the discussion of these matters from the open meeting requirements of the Act.

(2) Thus, the Commission has determined that a majority of its meetings or portions thereof may properly be closed to the public under the tenth exemption of the Sunshine Act, and that paragraph (d)(4) of the Sunshine Act is properly relied upon in promulgating the Commission's regulation in paragraph (a).

§ 1612.14 Judicial review.

Any person may bring an action in a United States District Court to challenge or enforce the provisions of this Part. Such action may be brought prior to or within sixty (60) calendar days after the meeting in question, except that if proper public announcement of the meeting is not made, the action may be instituted at any time within sixty (60) days after such announcement is made. An action may be brought where the agency meeting was held or in the District of Columbia.

PART 1613—EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

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AUTHORITY: 5 U.S.C. 1301, 3301, 3302, 7151-7154, 7301; E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218; E.O. 11222, 3 CFR, 1964-1965 Comp., p. 306, E.O. 11478, 3 CFR, 1969 Comp., p. 133, unless otherwise noted.

EDITORIAL NOTE: For nomenclature changes to Part 1613, see 43 FR 60901, Dec. 29, 1978.

Subpart A—[Reserved]

Subpart B—Equal Opportunity Without Regard to Race, Color, Religion, Sex, or National Origin

SOURCE: 37 FR 22717, Oct. 21, 1972, unless otherwise noted. Redesignated at 43 FR 60901, Dec. 29, 1978.

GENERAL PROVISIONS

§ 1613.201 Purpose and applicability.

(a) *Purpose.* This subpart sets forth the regulations under which an agency shall establish a continuing affirmative program for equal opportunity in employment and personnel operations without regard to race, color, religion, sex, or national origin and under which the Commission will review an agency's program and entertain an appeal from a person dissatisfied with an agency's decision or other final action on his complaint of discrimination on grounds of race, color, religion, sex, or national origin.

(b) *Applicability.* (1) This subpart applies: (i) To military department as defined in section 102 of title 5, United States Code, executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, the U.S. Postal Service, and the Postal Rate Commission, and to the employees thereof, including employees paid from nonappropriated funds, and (ii) to those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service and to the employees in those positions.

(2) This subpart does not apply to aliens employed outside the limits of the United States.

§ 1613.202 General policy.

It is the policy of the Government of the United States and of the government of the District of Columbia to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

§ 1613.203 Agency program.

The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the terms of its program, an agency shall:

(a) Provide sufficient resources to administer its equal employment opportunity program in a positive and effective manner and assure that the principal and operating officials responsible for carrying out the equal employment opportunity program meet established qualifications requirements;

(b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions, including disciplinary action against employees who engage in discriminatory practices;

(c) Utilize to the fullest extent the present skills of employees by all means, including the redesigning of jobs where feasible so that tasks not requiring the full utilization of skills of incumbents are concentrated in jobs with lower skill requirements;

(d) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(e) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis;

(f) Participate at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability;

(g) Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(h) Provide recognition to employees, supervisors, managers, and units demonstrating superior accomplishment in equal employment opportunity;

(i) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation;

(j) Provide for counseling employees and applicants who believe they have been discriminated against because of race, color, religion, sex, or national origin and for resolving informally the matters raised by them;

(k) Provide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex, or national origin; and

(l) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort.

§ 1613.204 Implementation of agency program.

To implement the program established under this subpart, an agency shall:

(a) Develop the plans, procedures, and regulations necessary to carry out its program established under this subpart;

(b) Appraise its personnel operations at regular intervals to assure their conformity with the policy in § 1613.202 and its program established in accordance with § 1613.203;

(c) Designate a Director of Equal Employment Opportunity and as many Equal Employment Opportunity Officers, Equal Employment Opportunity Counselors, Federal Women's Program Coordinators, and other persons as may be necessary, to assist the head of the agency to carry out the functions described in this subpart in all organizational units and locations of the agency. The functioning and the qualifications of the persons so designated shall be subject to review by the Commission. The Director of Equal Employment Opportunity shall be under the immediate supervision of the head of his agency, and shall be given the authority necessary to enable him to carry out his responsibilities under the regulations in this subpart;

(d) Assign to the Director of Equal Employment Opportunity the functions of:

(1) Advising the head of his agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports, and other matters pertaining to the policy in § 1613.202 and the agency program required to be established under § 1613.203;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial or supervisory employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and improve the agency's program for equal employment opportunity;

(4) Providing for counseling by an Equal Employment Opportunity Counselor, of any aggrieved employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin and for attempting to resolve on an informal basis the matter raised by the employee or applicant before a complaint of discrimination may be filed under § 1613.214;

(5) Providing for the receipt and investigation of individual complaints of

discrimination in personnel matters within the agency, subject to §§ 1613.211 through 1613.222;

(6) Providing for the acceptance and processing and/or rejection of class complaints in accordance with Subpart F of this part;

(7) When authorized by the head of the agency, making the decision under § 1613.221 for the head of the agency on complaints of discrimination and ordering such corrective measures as he may consider necessary, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee has been found to have engaged in a discriminatory practice; and

(8) When not authorized to make the decision for the head of the agency on complaints of discrimination, reviewing, at his discretion, the record on any complaint before the decision is made under § 1613.221 and making such recommendations to the head of the agency or his designee as he considers desirable, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee is found to have engaged in a discriminatory practice;

(e) Insure that equal opportunity for women is an integral part of the agency's overall program by assigning to the Federal Women's Program Coordinators the function of advising the Director of Equal Employment Opportunity on matters affecting the employment and advancement of women;

(f) Publicize to its employees and post permanently on official bulletin boards:

(1) The names and addresses of the Director of Equal Employment Opportunity and the Federal Women's Program Coordinators;

(2) The name and address of the appropriate Equal Employment Opportunity Officer;

(3) The name and address of the Equal Employment Opportunity Counselor and the organizational units he serves; his availability to counsel an employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin; and the requirement that an employee or applicant for employment must consult the Counselor as provided by § 1613.213 about his allegation of discrimination because of race, color, religion, sex, or national origin before a complaint as provided by § 1613.214 may be filed; and

(4) Time limits for contacting an Equal Employment Opportunity Counselor;

(g) Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (by substitution of another qualified employee, by a grant of leave, a change of a tour of duty, or other means) without undue hardship on the business of the agency. If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so;

(h) Make readily available to its employees a copy of its regulations issued to carry out its program of equal employment opportunity; and

(i) Submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to:

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

[37 FR 22717, Oct. 21, 1972, as amended at 37 FR 25699, Dec. 2, 1972; 42 FR 11808, Mar. 1, 1977. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.205 Commission review and evaluation of agency program operations.

The Commission shall review and evaluate agency program operations periodically, obtain such reports as it deems necessary, and report to the President as appropriate on overall progress. When it finds that an agency's program operations are not in conformity with the policy set forth in § 1613.202 and the regulations in this subpart, the Commission shall require improvement or corrective action to bring the agency's program operations into conformity with this policy and the regulations in this subpart. The head of each department and agency shall comply with the rules, regulations, orders, and instructions issued by the Commission.

AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

§ 1613.211 General.

An agency shall insure that its regulations governing the processing of complaints of discrimination on grounds of race, color, religion, sex, or national origin comply with the principles and requirements in §§ 1613.212 through 1613.222.

§ 1613.212 Coverage.

(a) The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment with that agency who believes that he has been discriminated against because of race, color, religion, sex, or national origin. A complaint may also be filed by an organization for the aggrieved person with his consent.

(b) The agency shall provide in its regulations for the acceptance of class complaints in accordance with Subpart F.

[37 FR 22717, Oct. 21, 1972, as amended at 42 FR 11808, Mar. 14, 1977. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.213 Precomplaint processing.

(a) An agency shall require that an aggrieved person who believes that he or she has been discriminated against because of race, color, religion, sex, or national origin consult with an Equal Employment Opportunity Counselor to try to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he or she believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of the counseling activities so as to brief, periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing the counselor's actions and advice both to the agency and the aggrieved person concerning the issues in the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct the final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to the counselor's attention by the aggrieved person. If, within 21 days, the matter has not been resolved to the satisfaction of the aggrieved person, that person shall be immediately informed in writing, at the time of the final interview, of his or her right to file a complaint of discrimination. The notice shall inform the complainant of his or her right to file a discrimination complaint at any time up to 15 calendar days after receipt of the notice of the appropriate official with whom to file a complaint and of complainant's duty to assure that the agency is immediately informed if the complainant retains counsel, or any other representative. The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from that person.

(b) The agency shall assure that full cooperation is provided by all employees to the Equal Employment Opportunity Counselor in the performance of his duties under this section.

(c) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the performance of his duties under this section.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, Reorganization Plan No. 1 of 1978 (43 FR 19807) and Executive Order 12106 (44 FR 1053))

[37 FR 22717, Oct. 21, 1972, as amended at 37 FR 25699, Dec. 2, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24[illegible], Apr. 9, 1980]

§ 1613.214 Filing and presentation of complaint.

(a) *Time limits.* (1) An agency shall require that a complaint be submitted in writing by the complainant or his representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if:

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him to believe he had been discriminated against within 30 calendar days of the date of that matter, or, if a personnel action, within 30 calendar days of its effective date; and

(ii) The complainant or his representative submitted his written complaint to an appropriate official within 15 calendar days of the date of his final interview with the Equal Employment Opportunity Counselor.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, an Equal Employment Opportunity Officer, a Federal Women's Program Coordinator, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with paragraph (a)(3) of this section.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge to the complainant or his representative in writing receipt of the complaint and advise the complainant in writing of all his administrative rights and of his right to file a civil action as set forth in § 1613.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section: (i) When the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; or (ii) for other reasons considered sufficient by the agency.

(b) *Presentation of complaint.* At any stage in the presentation of a complaint, including the counseling stage under § 1613.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of his own choosing. If the complainant is an employee of the agency, he shall have a reasonable amount of official time to present his complaint if he is otherwise in an active duty status. If the complainant is an employee of the agency and he designates another employee of the agency as his representative, the representative shall have a reasonable amount of official time, if he is otherwise in an active duty status, to present the complaint.

§ 1613.215 Rejection or cancellation of complaint.

The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of § 1613.212 or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency. He may cancel a complaint because of failure of the complainant to prosecute the complaint. He shall transmit the decision to reject or cancel by letter to the complainant and his representative.

The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission and of the time limit within which the appeal may be submitted and of his right to file a civil action as described in § 1613.281.

§ 1613.216 Investigation.

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even through they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term "investigative file" shall mean the various documents and information acquired during the investigation under this section—including affidavits of the complainant, of the alleged discriminating official, and of the witnesses and copies of, or extracts from, records, policy statements, or regulations of the agency—organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information.

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the person conducting the investigation a written authorization:

(1) To investigate all aspects of complaints of discrimination, (2) to require all employees of the agency to cooperate with him in the conduct of the investigation, and (3) to require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

(c) The Commission may assume responsibility for the investigation of any portion or all of an agency's complaints upon the execution of a memorandum of understanding to this effect with the agency. The agency shall reimburse the Commission for all expenses incurred in connection with the investigation. The Commission shall forward to the agency upon completion of the investigation the investigative file and the recommended disposition. The agency shall adopt as its proposed disposition of the complaint the Commission's recommended disposition unless within 30 days after the agency receives the investigative file and recommended disposition the complaint has been informally adjusted in accordance with § 1613.217(a), or the agency has notified the complainant of its own proposed disposition in accordance with §1613.217(b).

(42 U.S.C. 2000e-16(b), President's Reorganization Plan No. 1 of 1978, Executive Order 12106)

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at

44 FR 40499, July 11, 1979; 44 FR 45623, Aug. 3, 1979]

§ 1613.217 Adjustment of complaint and offer of hearing.

(a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. For this purpose, the agency shall furnish the complainant and the complainant's representative a copy of the investigative file promptly after receiving it from the investigator, and provide opportunity for the complainant to discuss the investigative file with appropriate officials.

If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. An informal adjustment of a complaint may include an award of back pay, attorney's fees or other appropriate relief. Where the parties agree on an adjustment of the complaint, but cannot agree on whether attorney's fees or costs should be awarded or on the amount of attorney's fees or costs, the issue of the award of attorney's fees or costs or the amount which should be awarded may be severed and shall be the subject of a final decision under § 1613.221(d). The decision of whether to award attorney's fees or costs or of the amount to be awarded may be the subject of an appeal to the Commission under the provisions of §§ 1613.231 through 1613.236. If the agency does not carry out, or rescinds, any action specified by the terms of the adjustment for any reason not attributable to acts or conduct of the complainant, the agency shall, upon the complainant's written request, reinstate the complaint for further processing from the point processing ceased under the terms of the adjustment.

(b) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing: (1) Of the proposed disposition of complaint, (2) of his right to a hearing and decision by the agency head or his designee if he notifies the agency in writing within 15 calendar days of the receipt of the notice that he desires a hearing, and (3) of his right to a decision by the head of the agency or his designee without a hearing.

(c) If the complainant fails to notify the agency of his wishes within the 15-day period prescribed in paragraph (b) of this section, the appropriate Equal Employment Opportunity Officer may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (b) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal Employment Opportunity Officer shall transmit the decision by letter to the complainant and his representative which shall inform the complainant of his right of appeal to the Commission and the time limit applicable thereto and of his right to file a civil action as described in § 1613.281. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complaint, together with the complaint file, shall be forwarded to the head of the agency, or his designee, for decision under § 1613.221.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, Reorganization Plan No. 1 of 1978 (43 FR 19807) and Executive Order 12106 (44 FR 1053))

[37 FR 22717, Oct. 21, 1972, as amended at 37 FR 25699, Dec. 2, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24131, Apr. 9, 1980]

§ 1613.218 Hearing.

(a) *Complaints examiner.* The hearing shall be held by a complaints examiner who must be an employee of another agency except when the agency in which the complaint arose is: (1) The government of the District of Columbia or, (2) an agency which, by reason of law, is prevented from divulging information concerning the matter complained of to a person who has not received the security clearance required by that agency, in which event the agency shall arrange with the Commission for the selection of an impartial employee of the agency to serve as complaints examiner. (For purposes of this paragraph, the Department of Defense is considered to be a single agency.) The agency in which the complaint arose shall request the Commission to supply the name of a complaints examiner who has been certified by the Commission as qualified to conduct a hearing under this section.

(b) *Arrangements for hearing.* The agency in which the complaint arose shall transmit the complaint file containing all the documents described in § 1613.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the complaints examiner in making his recommended decision on the complaint), to the complaints examiner who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the complaints examiner determines that further investigation is needed, he shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of § 1613.216 apply to any further investigation by the agency on the complaint. The complaints examiner shall schedule the hearing for a convenient time and place.

(c) *Conduct of hearing.* (1) Attendance at the hearing is limited to persons determined by the complaints examiner to have a direct connection with the complaint.

(2) The complaints examiner shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the complaints examiner shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policy or practices relevant to the complaint shall be received in evidence. The complainant, his representative, and the representatives of the agency at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) *Powers of complaints examiner.* In addition to the other powers vested in the complaints examiner by the agency in accordance with this subpart, the agency shall authorize the complaints examiner to:

(1) Administer oaths or affirmations;

(2) Regulate the course of the hearing;

(3) Rule on offers of proof;

(4) Limit the number of witnesses whose testimony would be unduly repetitious; and

(5) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(e) *Witnesses at hearing.* The complaints examiner shall request any agency subject to this subpart to make available as a witness at the hearing an employee requested by the complainant when he determines that the testimony of the employee is necessary. He may also request the appearance of an employee of any Federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. The complaints examiner shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. An agency to whom a request is made shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the complaints examiner and it is not administratively impracticable to comply with the request. When it is administratively impracticable to comply with the request for a witness, the agency to whom request is made shall provide an explanation to the complaints examiner. If the explanation is inadequate, the complaints examiner shall so advise the agency and request it to make the employee available as a witness at the hearing. If the explanation is adequate, the complaints examiner shall insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to secure testimony from the employee through a written interrogatory. An employee of an agency shall be in a duty status during the time he is made available as a witness.

(f) *Record of hearing.* The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the complaints examiner at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, he shall make the document available to the agency representative for reproduction.

(g) *Findings, analysis, and recommendations.* The complaints examiner shall transmit to the head of the agency or his designee: (1) The complaint file (including the record of the hearing), (2) the findings and analysis of the complaints examiner with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and (3) the recommended decision of the complaints examiner on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose. The complaints examiner shall notify the complainant of the date on which this was done. In addition, the complaints examiner shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to conditions in the agency which do not bear directly on the matter which gave rise to the complaint or which bear on the general environment out of which the complaint arose.

§ 1613.219 Relationship to other agency appellate procedures.

When an employee makes a written allegation of discrimination on grounds of race, color, religion, sex, or national origin, in connection with an action that would otherwise be processed under a grievance or other system of the agency, the allegation of discrimination shall be processed under this part.

[39 FR 32540, Sept. 9, 1974. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.220 Avoidance of delay.

(a) The complaint shall be resolved promptly. To this end, both the complainant and the agency shall proceed with the complaint without undue delay so that the complaint is resolved within 180 calendar days after it was filed, including time spent in the processing of the complaint by the complaints examiner under § 1613.218.

(b) The head of the agency or his designee may cancel a complaint if the complainant fails to prosecute the complaint without undue delay. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available.

(c) The agency shall furnish the Commission monthly reports on all complaints pending within the agency in a form specified by the Commission. If an agency has not issued a final decision, and has not requested the Commission to supply a complaints examiner, within 75 calendar days from the date a complaint was filed, the Commission may require the agency to take special measures to insure prompt processing of the complaint or may assume responsibility for processing the complaint, including supplying an investigator to conduct any necessary investigation on behalf of the agency. When the Commission supplies an investigator, the agency shall reimburse the Commission for all expenses incurred in connection with the investigation and shall notify the complainant in writing of the proposed disposition of the complaint no later than 15 calendar days after its receipt of the investigative report.

(d) When the complaints examiner has submitted a recommended decision finding discrimination and the agency has not issued a final decision within 180 calendar days after the date the complaint was filed, the complaints examiner's recommended decision shall become a final decision binding on the agency 30 calendar days after its submission to the agency. In such event, the agency shall so notify the complainant of the decision and furnish to him a copy of the findings, analysis, and recommended decision of the complaints examiner under § 1613.218(g) and a copy of the hearing record and also shall notify him in writing of his right of appeal to the Commission and the time limits applicable thereto and of his right to file a civil action as described in § 1613.281.

§ 1613.221 Decision by head of agency or designee.

(a) The head of the agency, or his designee, shall make the decision of the agency on a complaint based on information in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

(b)(1) The decision of the agency shall be in writing, shall reflect the date of its issuance, and shall be transmitted to the complainant and his or her representative either by certified mail, return receipt requested, or by any other method which enables the agency to show the date of receipt.

(2) When there has been a hearing on the complaint, the decision letter shall transmit a copy of the findings, analysis, and recommended decision of the complaints examiner under § 1613.218(g) and a copy of the hearing record. The decision of the agency shall adopt, reject, or modify the decision recommended by the complaints examiner. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the specific reasons in detail for rejection or modification.

(3) When there has been no hearing and no decision under § 1613.217(c), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issue of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall (1) advise the complainant and his or her representative that any request for attorney's fees or costs must be documented and submitted within 20 calendar days of receipt, (2) require remedial action to be taken in accordance with § 1613.271, (3) review the matter giving rise to the complaint to determine whether disciplinary action against alleged discriminatory officials is appropriate, and (4) record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be recorded in the complaint file.

(d) When the final agency decision provides for an award of attorney's fees or costs, the amount of these awards shall be determined under § 1613.271(c). In the unusual situation in which the agency determines not to award attorney's fees or costs to a prevailing complainant, the agency shall set forth in its decision the specific reasons for denying the award.

(e) The decision letter shall inform the complainant of his or her right to appeal the decision of the agency to the Commission, and shall include the text of 29 CFR 1613.233 (a) and (b). The decision letter shall also inform the complainant of his or her right to file a civil action in accordance with § 1613.281, and of the time limits applicable thereto.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, Reorganization Plan No. 1 of 1978 (43 FR 19807) and Executive Order 12106 (44 FR 1053))

[37 FR 22717, Oct. 21, 1972, as amended at 37 FR 25699, Dec. 2, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 44 FR 34495, June 15, 1979; 45 FR 24132, Apr. 9, 1980]

§ 1613.222 Complaint file.

The agency shall establish a complaint file. Except as provided in § 1613.221(c), this file shall contain all documents pertinent to the complaint. The complaint file shall include copies of: (a) The notice of the Equal Employment Opportunity Counselor to the aggrieved person under § 1613.213(a), (b) the written report of the Equal Employment Opportunity Counsel under § 1613.213 to the Equal Employment Opportunity Officer on whatever precomplaint counseling efforts were made with regard to the complainant's case, (c) the complaint, (d) the investigative file, (e) if the complaint is withdrawn by the complainant, a written statement of the complainant or his representative to that effect, (f) if adjustment of the complaint is arrived at under § 1613.217, the written record of the terms of the adjustment, (g) if no adjustment of the complaint is arrived at under § 1613.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of his right to a hearing, (h) if decision is made under § 1613.217(c), a copy of the letter to the complainant transmitting that decision, (i) if a hearing was held, the record of the hearing, together with the complaints examiner's findings, analysis, and recommended decision on the merits of the complaint, (j) if the Director of Equal Employment Opportunity is not the designee, the recommendations, if any, made by him to the head of the agency or his designee, and (k) if decision is made under § 1613.221, a copy of the letter transmitting the decision of the head of the agency or his designee. The complaint file shall not contain any document that has not been made available to the complainant or to his designated physician under 5 CFR 294.401.

APPEAL TO THE COMMISSION

§ 1613.231 Entitlement.

(a) Except as provided by paragraph (c) of this section, a complainant may appeal to the Commission the decision of the head of the agency, or his/her designee: (1) To reject his/her complaint, or any portion thereof, for reasons covered by § 1613.215; or (2) to cancel his/her complaint because of the complainant's failure to prosecute the complaint; or (3) on the merits of the complaint, under § 1613.217(c) or § 1613.221, or on the award of attorney's fees or costs.

(b) Except as provided by paragraph (c) of this section, a complainant may appeal to the Commission on issues of employment discrimination raised in a negotiated grievance procedure, where the agency's negotiated labor-management agreement permits such issues to be raised therein. A complainant may appeal the decision: (1) Of the agency head or his/her designee on the grievance; (2) of the arbitrator on the grievance; or (3) of the Federal Labor Relations Authority (FLRA) on exceptions to the arbitrator's award. A complainant may not appeal under this subsection, however when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration or is before the FLRA. Any appeal prematurely filed in such circumstances shall be dismissed without prejudice.

(c) A complainant may not appeal to the Commission under paragraph (a) of this section, when the issue of discrimination giving rise to the complaint is being considered or has been considered, in connection with any other appeal by the complainant.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, secs. 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 and 794a, sec. 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 633a, sec. 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 206(d), Reorg. Plan No. 1 of 1978 (43 FR 19807) and E.O. 12106 (44 FR 1053))

[48 FR 19707, May 2, 1983]

§ 1613.232 Where to appeal.

The complainant shall file his appeal in writing, either personally or by mail, with the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506.

[43 FR 60901, Dec. 29, 1978; 45 FR 780, Jan. 3, 1980]

§ 1613.233 Time limit.

(a) Except as provided in paragraph (c) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the Commission. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal. For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a decision to award attorney's fees or costs is made, the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

(b) When issues of discrimination have been raised in a negotiated grievance process, a complainant may file a Notice of Appeal of such issues up to 20 days after: (1) Receipt of an agency decision on the grievance and expiration of the time during which the union and the agency may move the matter to the next state of the grievance process; (2) receipt of an arbitrator's award; or (3) receipt of the decision of the FLRA on exceptions to the arbitrator's award.

(c) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon a written statement by the complainant showing that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the Appeal.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, secs. 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 and 794a, sec. 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 633a, sec. 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 206(d), Reorg. Plan No. 1 of 1978 (43 FR 19807) and E.O. 12106 (44 FR 1053))

[44 FR 34495, June 15, 1979, as amended at 48 FR 19707, May 2, 1983]

§ 1613.234 Appellate procedures.

The Office of Review and Appeals shall review the complaint file and all relevant written representations made to the board. The board may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. This subpart applies to any further investigation or rehearing resulting from a remand from the board. There is no right to a hearing before the board. The board shall issue a written decision setting forth its reasons for the decision and shall send copies thereof to the complainant, his designated representative, and the agency. When corrective action is ordered, the agency shall report promptly to the board that the corrective action has been taken. The decision of the board is final, but shall contain a notice of the right to file a civil action in accordance with § 1613.282.

[39 FR 32540, Sept. 9, 1974. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.235 Review by the Commissioners.

(a) The Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued;

(2) The previous decision involves an erroneous interpretation of law or regulation or misapplication of established policy; or

(3) The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

(b) When an agency gives notice of intent to request reopening within the time specified in the decision of the Office of Review and Appeals and for the agency report of corrective action, the agency may not effect the corrective action recommended by the Office except as provided in this paragraph. When the agency gives notice of intent to request reopening, and when the appeal involves removal, separation, or suspension continuing beyond the date of the request for reopening, and when the Office decision recommends retroactive restoration, the agency shall comply with the Board decision only to the extent of the temporary or conditional restoration of the employee to duty status in the position recommended by the Office pending the outcome of the agency request for reopening. The agency shall notify the Office and the employee in writing that the corrective action it takes is temporary or conditional at the same time it gives notice of intent to request reopening. When the agency does not give notice of intent to request reopening within the time specified in the Office decision for the agency report of corrective action, or when, after giving notice of intent to request reopening, the agency does not file a request for reopening within 30 days from the date of the Office decision, or when a request to reopen is denied, the agency shall effect the corrective action recommended by the Office, and there is no further right by the agency to request reopening.

However, service under the temporary or conditional restoration provisions of this paragraph may not be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure.

[39 FR 32540, Sept. 9, 1974. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.236 Relationship to other appeals.

When the basis of the complaint of discrimination because of race, color, religion, sex, or national origin, involves an action which is otherwise appealable to the Commission and the complainant having been informed by the agency of his right to proceed under this subpart elects to proceed by appeal to the Commission, the case, including the issue of discrimination, will be processed under the regulations appropriate to that appeal when the complainant makes a timely appeal to the Commission in accordance with those regulations.

REPORTS TO THE COMMISSION

§ 1613.241 Reports to the Commission on complaints.

Each agency shall report to the Commission information concerning precomplaint counseling and the status and disposition of complaints under this subpart at such times and in such manner as the Commission prescribes.

CONSOLIDATION OF COMPLAINTS

§ 1613.251 Joint processing and consolidation of complaints.

(a) Two or more complaints of discrimination filed by employees or applicants for employment with the agency consisting of substantially similar allegations of discrimination may, with the written permission of the complainants, be consolidated by the agency or Commission.

(b) Two or more individual complaints of discrimination from the same employee or applicant for employment may, at the discretion of the agency or the Commission, be joined for processing after notifying the individual that the complaints will be processed jointly.

[42 FR 11808, Mar. 1, 1977. Redesignated at 43 FR 60901, Dec. 29, 1978]

FREEDOM FROM REPRISAL OR INTERFERENCES

§ 1613.261 Freedom from reprisal.

(a) Complainants, their representatives, and witnesses shall be free from restraint, interference, coercion, discrimination, or reprisal at any stage in the presentation and processing of a complaint, including the counseling stage under § 1613, or any time thereafter.

§ 1613.262 Review of allegations of reprisal.

(a) A complainant, his/her representative, or a witness who alleges restraint, interference, coercion, discrimination or reprisal for having filed a complaint or for having participated in the processing of a complaint under this subpart, may, if an employee or applicant, have the allegation reviewed as an individual complaint of discrimination subject to §§ 1613.211 through 1613.283.

(b) When a complainant alleges that (s)he has been subjected to restraint, interference, coercion, discrimination or reprisal in connection with the filing of a prior complaint of discrimination and that prior complaint from which the allegation derives is in process at the agency at the time the allegation is made, the complainant may request the agency to consolidate the allegation with the prior complaint. If the prior complaint is at the hearing stage of the complaint process under § 1613.218, the complainant may request the Complaints Examiner to consolidate the allegation with the complaint at the hearing. The agency or the Complaints Examiner may grant the request, *Provided,* that the request is made within 30 calendar days of occurrence of the act which forms the basis of the allegation, or within 30 calendar days of its effective date, if a personnel action. The agency or the Complaints Examiner may also deny the request, at its/his/her discretion, and require that the allegation be processed in accordance with § 1613.262(a).

(Sec. 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, secs. 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 and 794a, sec. 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 633a, sec. 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 206(d), Reorg. Plan No. 1 of 1978 (43 FR 19807) and E.O. 12106 (44 FR 1053))

[48 FR 19708, May 2, 1983]

REMEDIAL ACTIONS

§ 1613.271 Remedial actions.

(a) *Remedial action involving an applicant.* (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant employment of the type and grade denied him or her, unless the record contains clear and convincing evidence that the applicant would not have been hired even absent discrimination. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired, subject to the limitation in paragraph (a)(4) of this section. Backpay, computed in the same manner prescribed by 5 CFR 550.804, shall be awarded from the beginning of the retroactive period, subject to the same limitation, until the date the individual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer is declined, the agency shall award the individual a sum equal to the backpay he would have received, computed in the same manner prescribed by 5 CFR 550.804, from the date he would have been appointed until the date the offer was made, subject to the limitation of paragraph (a)(4) of this section. The agency shall inform the applicant, in its offer, of his right to this award in the event he declines the offer.

(2) When an agency, or the Commission finds that discrimination existed at the time the applicant was considered for employment but also finds clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency nevertheless shall consider the individual for any existing vacancy of the type and grade for which he or she was considered initially and is qualified before considering other candidates. If the individual is not selected, the agency shall record the reasons for nonselection. If no vacancy exists, the agency shall give him this priority consideration for the next vacancy for which he is qualified. This priority shall take precedence over priorities provided under other regulations in this chapter.

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of backpay shall be made.

(4) A period of retroactivity or a period for which backpay is awarded under this paragraph may not extend from a date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant. If a finding of discrimination was not

based on a complaint, the period of retroactivity or period for which backpay is awarded this paragraph may not extend earlier than 2 years prior to the date the finding of discrimination was recorded.

(b) *Remedial action involving an employee.* When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with backpay computed in the same manner prescribed by 5 CFR 550.804, unless the record contains clear and convincing evidence that the employee would not have been promoted or employed at a higher grade, even absent discrimination. The backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any even, not to exceed the date the employee would have been promoted. If a finding of discrimination was not based on a complaint, the backpay liability may not accrue from a date earlier than 2 years prior to the date the finding of discrimination was recorded, but, in any event, not to exceed the date he would have been promoted.

(2) Consideration for promotion to a position for which the employee is qualified before consideration is given to other candidates, if the record contains clear and convincing evidence that, although discrimination existed at the time selection for promotion was made, the employee would not have been promoted even absent discrimination. If the individual is not selected, the agency shall record the reasons for nonselection. This priority consideration shall take precedence over priorities under other regulations in this chapter.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied him (e.g., training, preferential work assignments, overtime scheduling).

(c) *Attorney's Fees or Costs*—(1) *Awards of Attorney's Fees or Costs.* The provisions of this Subpart relating to the award of attorney's fees or costs shall apply to allegations of discrimination or retaliation prohibited by section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, except that no award of attorney's fees shall be made with funds appropriated under Pub. L. 95-391, the Legislative Branch Appropriation Act of 1979. In a decision by an agency, under § 1613.217, §1613.220 (d) §1613.221 or §1613.612 or by the Commission, under §1613.234 or §1613.262 or §1613.631(a)(3), the agency or Commission may award the applicant or employee reasonable attorney's fees or costs incurred in the processing of the complaint or charge.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid only for services performed after the filing of the complaint required in § 1613.214 and after the complainant has notified the agency that he or she is represented by an attorney, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Written submissions to the agency which are signed by the representative shall be deemed to constitute notice of representation.

(2) *Amount of awards.* When a decision of the agency, under § 1613.217(c), § 1613.220(d), § 1613.221 or § 1613.612 or of the Commission, under § 1613.234, § 1613.262 or § 1613.631(a) (3) provides for an award of attorney's fees or costs, the complainant's attorney shall submit a verified statement

of costs and attorney's fees, as appropriate, to the agency within 20 days of receipt of the decision. A statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be awarded the complainant shall be determined by agreement between the complainant, the complainant's representative and the agency. Such agreement shall immediately be reduced to writing. If the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 calendar days of receipt of the verified statement and accompanying affidavit, the agency shall issue a decision determining the amount of attorney's fees or costs within 30 calendar days of receipt of the statement and affidavit. Such decision shall include the specific reasons for determining the amount of the award.

(i) The amount of attorney's fees shall be made in accordance with the following standards: the time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases.

(ii) The costs which may be awarded are those authorized by 28 U.S.C. 1920 to include (A) fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case; (B) fees and disbursements for printing and witnesses; and (C) fees for exemplification and copies of papers necessarily obtained for use in the case. Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. § 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, Reorganization Plan No. 1 of 1978 (43 FR 19807) and Executive Order 12106 (44 FR 1053))

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24132, Apr. 9, 1980]

RIGHT TO FILE A CIVIL ACTION

§ 1613.281 Statutory right.

An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate United States district court:

(a) Within thirty (30) calendar days of receipt of notice of final action taken by the agency on a complaint,

(b) After one hundred and eighty (180) calendar days from the date of filing a complaint with the agency if there has been no decision,

(c) Within thirty (30) calendar days after receipt of final action taken by the Commission on the complaint, or

(d) After one hundred and eighty (180) calendar days from the date of filing an appeal with the Commission, if there has been no Commission decision.

For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

(Sec. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, Reorganization Plan No. 1 of 1978 (43 FR 19807) and Executive Order 12106 (44 FR 1053))

[45 FR 24133, Apr. 9, 1980]

§ 1613.282 Notice of right.

An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under §§ 1613.215, 1613.217, 1613.220, or § 1613.221. The Commission shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any decision under § 1613.234.

[37 FR 22717, Oct. 21, 1972, as amended at 37 FR 25699, Dec. 2, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.283 Effect on administrative processing.

The filing of a civil action by an employee or applicant does not terminate agency processing of a complaint or Commission processing of an appeal under this subpart.

Subpart C—Minority Group Statistics System

§ 1613.301 Applicability.

(a) This subpart applies (1) to military departments as defined in section 102 of title 5, United States Code, Executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, the U.S. Postal Service, and the Postal Rate Commission, and to the employees thereof, including employees paid from nonappropriated funds, and (2) to those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service and to the employee in those positions.

(b) This subpart does not apply to aliens employed outside the limits of the United States.

[34 FR 5371, Mar. 19, 1969, as amended at 34 FR 14024, Sept. 4, 1969; 36 FR 11999, June 24, 1971. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.302 Agency systems.

(a) Each agency shall establish a system which provides statistical employment information by race or national origin.

(b) Data shall be collected only by visual identification and shall be disclosed only in the form of gross statistics. An agency shall not collect or maintain any information of the race or national origin of individual employees except when an automated data processing system is used in accordance with standards and requirements prescribed by the Commission to insure individual privacy and the separation of that information from personnel records.

(c) Each system is subject to the following controls:

(1) Only those categories of race and national origin prescribed by the Commission may be used;

(2) Only the specific procedures for the collection and maintenance of data that are prescribed or approved by the Commission may be used;

(3) The Commission shall review the operation of the agency system to insure adherence to Commission procedures and requirements. An agency may make an exception to the prescribed procedures and requirements only with the advance written approval of the Commission.

(d) The agency may use the data only in studies and analyses which contribute affirmatively to achieving the objectives of the equal employment opportunity program. An agency shall not establish a quota for the employment of persons on the basis of race, color, religion, sex, or national origin.

(e) An agency shall report to the Commission on employment by race and national origin in the form and at such times as the Commission may require.

[34 FR 5371, Mar. 19, 1969, as amended at 34 FR 14024, Sept. 4, 1969. Redesignated at 43 FR 60901, Dec. 29, 1978]

Subpart D—Processing Mixed Case Complaints

AUTHORITY: Sec. 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, secs. 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 and 794a, sec. 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 633a, sec. 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 206(d), Reorg. Plan No. 1 of 1978 (43 FR 19807) and E.O. 12106 (44 FR 1053), unless otherwise noted.

SOURCE: 48 FR 19708, May 2, 1983, unless otherwise noted.

§ 1613.401 Purpose, scope and applicability.

(a) *Purpose.* This subpart sets forth the regulations under which the Equal Employment Opportunity Commission will carry out its responsibilies for the administration and enforcement of Section 205 of the Civil Service Reform Act of 1978, 5 U.S.C. 7702, with respect to matters of alleged employment discrimination prohibited by Section 717 of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794a, Section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 633a, and Section 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 206(d).

(b) *Scope.* This subpart shall govern the treatment of complaints in which allegations of discrimination are raised, in connection with an action appealable to the Merit Systems Protection Board (MSPB), provided that the action which forms the basis of the complaint was initiated on or after January 11, 1979 (the effective date of the Civil Service Reform Act). This subpart governs the procedures applicable: (1) When a complainant elects to bring the matter which forms the basis of the complaint before his/her agency, by filing a complaint of discrimination, pursuant to this part; (2) when an appealable action, pending before the MSPB, is remanded for agency processing, pursuant to 5 CFR 1201.155(c); and (3) when a petition to review the decision of the MSPB on the issues of discrimination is filed with the Commission, pursuant to 5 U.S.C. 7702(b).

(c) *Applicability.* This subpart applies to all persons who have a right of appeal to the MSPB.

§ 1613.402 Definitions.

(a) *Mixed Case Complaint.* A mixed case complaint is: (1) A complaint of employment discrimination filed with a federal agency, based on race, color, religion, sex, national origin, handicap, age, and/or reprisal, related to, or stemming from an action taken by an agency against the complainant, which action may be appealed to the MSPB, pursuant to any law, rule or regulation; or (2) a complaint of sex-based wage discrimination, filed with the Commission, related to or stemming from an action taken by an agency against a complainant, which action may be appealed to the MSPB, pursuant to any law, rule or regulation. The complaint may contain only an allegation of employment discrimination or it may contain additional allegations which the MSPB has jurisdiction to address.

(b) *Mixed Case Appeals.* A mixed case appeal is an appeal filed with the MSPB, which jurisdiction to entertain, and which alleges that the agency action which forms the basis for the appeal was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap, age and/or reprisal, or alleges that such appealable action resulted in sex-based wage discrimination.

(c) *Complaint.* A complaint is a formal complaint of discrimination, filed with the appropriate person designated to receive complaints at the agency, pursuant to § 1613.214 of Subpart B of this part.

(d) *Proposal.* A proposal, as used in this subpart, means any document issued by an agency to an employee, pursuant to any requirements contained in regulations issued by the Office of Personnel Management (OPM), which proposes to take an action against that employee which, if effected, could be appealed by that employee to the MSPB.

(e) *Handicap Definitions.* The definitions set forth at § 1613.702 of Subpart G of this part are hereby incorporated by reference into this Subpart and are applicable to any mixed case complaint which contains issues of handicap discrimination.

§ 1613.403 Election.

An aggrieved person may initially file a mixed case complaint with an agency, pursuant to this part, or (s)he may file a mixed case appeal directly with the MSPB, pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action which is appealable to the MSPB and who has raised the issue of discrimination either orally or in writing, during the processing of the action, of his/her right to file a mixed case complaint, if the employee believes the action to be based, in whole or in part, on discrimination, or to file a mixed case appeal with the MSPB. The person shall be advised that (s)he may not initially file both and that whichever is filed first (the mixed case complaint or the appeal) shall be considered an election to proceed in that forum. For the purposes of this subsection, filing of a mixed case complaint occurs when the complaint is filed with an apropriate agency official, in accordance with § 1613.214(a)(3) of Subpart B of this part.

§ 1613.404 Retroactivity.

The following shall apply, with respect to mixed case complaints filed prior to the effective date of these regulations, where any issues in such mixed case complaints were also appealed to the MSPB:

(a) *Discrimination Allegations Considered.* If the MSPB considered, or is considering, the allegations of discrimination raised in the mixed case complaint, in connection with any appeal, the mixed case complaint before the agency shall be cancelled, pursuant to § 1613.405(b).

(b) *Discrimination Allegations Not Considered.* If the MSPB was not presented with or did not consider the allegations of discrimination raised in the mixed case complaint in connection with any appeal, the agency shall process such mixed case complaint in accordance with § 1613.405(e). The final agency decision on such complaint shall advise the complainant of his/her right to file a civil action, pursuant to § 1613.417, and that (s)he may petition the MSPB to review his/her previous appellate decision, to include the allegations of discrimination raised with the agency which were not previously decided on appeal by the MSPB. The decision shall further advise the complainant that, whether or not the MSPB chooses to review its previous decision, the complainant may thereafter petition the EEOC to review the matter, pursuant to § 1613.414, provided that the complainant has fullfilled the procedural prerequisite of first petitioning the MSPB.

§ 1613.405 Procedures for agency processing of mixed case complaints.

(a) *Rejections.* Whenever an agency is presented with a mixed case complaint concerning an action that has previously been appealed by the complainant to the MSPB, the agency shall reject the complaint (in writing), citing this sub-section as the authority therefor, regardless of whether the allegations of discrimination raised in the mixed case complaint were raised in the previous appeal to the MSPB. The agency shall advise the aggrieved person, as part of the decision rejecting such a complaint, that (s)he must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 CFR 1201.155.

(b) *Cancellation.* Whenever the agency learns that a mixed case complaint, which has been filed with and accepted by the agency, contains issues which also form the basis of an appeal which has been filed with the MSPB, the agency shall determine which was filed first (i.e., the mixed case complaint or the appeal). If the appeal to the MSPB was filed first, the agency shall cancel (in writing) that portion of the mixed case complaint related to the action appealed to the MSPB and advise the complainant, as part of the decision which cancels the complaint (in whole or in part), that (s)he must bring the allegations of discrimination to the attention of the MSPB, pursuant to 5 CFR 1201.155. If the mixed case complaint was filed first, the agency shall so advise the MSPB and request that the MSPB dismiss the appeal without prejudice and, thereafter, the agency shall process the complaint, pursuant to § 1613.405(e), and issue an agency decision within 120 calendar days. An agency may also cancel a mixed case complaint when it learns that the complainant has chosen to appeal the matter to the MSPB upon expiration of 120 calendar days from the date that the mixed case complaint was filed with the agency.

(c) *Effect of Rejection or Cancellation.* An agency decision to reject or cancel a mixed case complaint pursuant to §§ 1613.405(a) or (b) is not subject to appeal to the EEOC, except where §§ 1613.405(a) or (b) has been misapplied to a nonmixed case matter (in which case an appeal may be filed pursuant to § 1613.231 of Subpart B).

(d) *MSPB Remands.* The MSPB may remand allegations of discrimination to an agency or, in Equal Pay Act matters, to the EEOC, pursuant to 5 CFR 1201.155(a) or (c). In such cases, the agency or the EEOC shall investigate those allegations, as required by the MSPB or by applicable EEOC regulation.

(e) *Procedures.* When a complainant, pursuant to § 1613.403, elects to proceed initially through the agency, rather than with the MSPB, the procedures set forth in §§ 1613.211 through 1613.221(d) of Subpart B of this part shall govern the processing of the mixed case complaint, with the following exceptions: (1) There shall be no hearing, as provided in § 1613.218 and as referenced in §§ 1613.217(b)(2) and 1613.221(b)(2) and (3); (2) at the time that an agency advises a complainant of the acceptance of a mixed case complaint, pursuant to § 1613.214, the agency shall also advise the complainant of the following: (i) The complaint shall be processed in accordance with this subpart; (ii) if no agency decision is issued within 120 calendar days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter, up to, but not later than, one year from the filing of the complaint, or may file a civil action, as specified at § 1613.417(g); and (iii) if the complainant is dissatisfied with the agency's decision on the mixed case complaint, (s)he may appeal the matter to the MSPB (not EEOC), within 20 calendar days of receipt of the agency's decision; (3) at the time that an agency issues to the complainant its notice of proposed disposition, pursuant to § 1613.217(b), the agency shall advise the complainant that the complainant: (i) May request a decision (pursuant to § 1613.221 of Subpart B of this part) from the agency, without a hearing and thereafter, appeal that decision to the MSPB (and, in connection therewith, request a hearing), within 20 calendar days of receipt of that agency decision, or (ii) if no decision is received within 120 calendar days of filing the mixed case complaint, may appeal the matter directly to the MSPB (not EEOC) at any time after expiration of 120 calendar days, up to, but no later than, one year after filing the mixed case complaint and of his/her right to file a civil action, as described at § 1613.417(g); (4) at the time that the agency issues its decision on a mixed case complaint (pursuant to § 1613.221) the agency shall advise the complainant of his/her right to appeal the matter to the MSPB (not EEOC), within 20 calendar days of receipt, and of his/her right to file a civil action, as described at § 1613.417(a).

§ 1613.406 Processing of complaints on proposals.

(a) *Where the Agency Decision is Appealable to the MSPB.* (1) Any complaint which is filed, pursuant to this part, in connection with an agency proposal to take an action that is appealable to the MSPB, shall be consolidated, pursuant to § 1613.251 of Subpart B of this part, with any subsequent mixed case complaint filed in connection with that agency decision to take such an action, either as proposed or as modified during the processing of the proposal, and shall be processed in accordance with this subpart.

(2) If, following a complaint on a proposal, the complainant subsequently files an appeal with the MSPB on the subsequent agency decision resulting from that proposal, the agency shall cancel the complaint on the proposal. The complainant shall be advised by the agency that any allegations of discrimination contained in that complaint should be raised with the MSPB, in connection with the pending appeal.

(3) If a complaint is filed on a proposal, and no appeal is filed with the MSPB on the subsequent appealable agency decision resulting from that proposal, and no complaint is filed with the agency on that appealable de-

cision, the complaint on the proposal shall be deemed to include the final decision as an issue (as of the effective date of such final decision) and shall be processed as a mixed case complaint, in accordance with § 1613.405.

(b) *Where the Agency Decision is Not Appealable to the MSPB.* Where a proposal does not result in an agency decision which is appealable to the MSPB (e.g., a proposal to remove which is modified by the agency decision to a 5 day suspension), such a complaint shall be processed pursuant to Subparts B, E, F and/or G of this part, as appropriate.

§ 1613.407 Timely processing.

A mixed case complaint shall be processed in a timely manner by the agency, so that the agency's decision (pursuant to § 1613.221 of Subpart B of this part) on such a complaint is issued within 120 calendar days from the date the complaint was filed. When a complaint concerning a proposal to take an action that is appealable to the MSPB is consolidated, pursuant to § 1613.406, with a mixed case complaint concerning an agency decision to take the action as proposed or as modified, and that agency decision is appealable to the MSPB, the 120 calendar day time frame for processing the consolidated mixed case complaint begins to run as of the date the complaint concerning that agency decision is filed. For the purposes of §1613.406(a)(3), the 120 calendar day time frame for processing the complaint shall begin to run as of the effective date of the final decision.

§ 1613.414 Filing requirements.

(a) *Who may file.* Petitions to consider issues of prohibited discrimination may be filed by individuals (and/or their representatives) who have been before the Merit Systems Protection Board with a matter involving allegations of discrimination and have received a final decision pursuant to the Merit Systems Protection Board's regulations at 5 CFR 1201.151 et seq. and under 5 U.S.C. 7702.

(b) *Method of filing.* Filing should be made by certified or registered mail return receipt requested to the Office of Review and Appeals, Equal Employment Opportunity Commission, Washington, D.C. 20506.

(c) *Time to file.* In order to be timely any petition must be filed with the Commission either within thirty (30) days after receipt of notice of the final decision of the Merit Systems Protection Board, or within thirty (30) days after the initial decision of a Merit Systems Protection Board field office becomes final. The date of filing shall be determined by the date of mailing indicated on the certified or registered mail.

(Civil Service Reform Act of 1978, (5 U.S.C. 7702))

[45 FR 50327, July 29, 1980]

§ 1613.415 Contents of petition.

(a) *Form.* Petitions must be written or typed, but may use any format including a simple letter format.

(b) *Contents.* Petitions must contain the following:

(1) The name and address of the individual;

(2) The name and address of the individual's representative, if any;

(3) A statement of the reasons why the individual and/or representative believes the decision of the Merit Systems Protection Board is incorrect, in whole or in part, with regard to issues of discrimination based on race, color, religion, sex, national origin, age, handicap and/or violations of the Equal Pay Act;

(4) A copy of the decision issued by the Merit Systems Protection Board; and

(5) The signature of the individual and/or representative, if any.

(Civil Service Reform Act of 1978, (5 U.S.C. 7702))

[45 FR 50327, July 29, 1980]

§ 1613.416 Consideration procedures.

(a) Once a petition is filed, the Commission will examine it and determine whether the Commission should consider the decision of the Merit Systems Protection Board and issue its own decision. The Commission's decision in such a case may differ from or concur with the Merit Systems Protection Board's decision.

(b) The Commission shall determine whether to consider the decision of the Merit Systems Protection Board within thirty (30) days after the date of the petition. For the purpose of this section the date of the petition shall be the date on which the Commission's Office of Review and Appeals receives the petition. A determination of the Commission not to consider the decision shall not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(c) If the Commission makes a determination to consider the decision, the Commission shall within sixty (60) calendar days after the date of its determination, consider the entire record of the proceedings of the Merit Systems Protection Board and on the basis of the evidentiary record before the Board as supplemented in accordance with paragraph (d) of this section, either:

(1) Concur in the decision of the Merit Systems Protection Board, or

(2) Issue in writing a decision which differs from the decision of the Merit Systems Protection Board to the extent that the Commission finds that, as a matter of law:

(i) The decision of the Merit Systems Protection Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in 5 U.S.C. 7702(a)(1)(B), or (ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(d) In considering any decision of the Merit Systems Protection Board, the Commission pursuant to 5 U.S.C. 7702(b)(4), may refer the case to the Merit Systems Protection Board for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed) of additional evidence or provide on its own for the taking of additional evidence to the extent the Commission considers it necessary to supplement the record.

(Civil Service Reform Act of 1978, (5 U.S.C. 7702))

[45 FR 50327, July 29, 1980]

§ 1613.417 Right to file a civil action.

An individual who has a complaint processed pursuant to 5 CFR 1201.151 et seq. and these regulations is authorized by 5 U.S.C. 7702, to file a civil action based on the decision of the Merit Systems Protection Board in an appropriate U.S. District Court:

(a) Within thirty (30) calendar days of receipt of notice of the final action taken by an agency on a complaint unless an appeal is filed with the Merit Systems Protection Board; or

(b) Within thirty (30) calendar days of receipt of notice of the final decision or action taken by the Merit Systems Protection Board if the individual does not file a petition for consideration with the EEOC; or

(c) Within thirty (30) calendar days of receipt of notice that the Commission has determined not to consider the decision of the Merit Systems Protection Board; or

(d) Within thirty (30) calendar days of receipt of notice that the Commission concurs with the decision of the Merit Systems Protection Board; or

(e) If the Commission issues a decision different from the decision of the Merit Systems Protection Board, within thirty (30) calendar days of receipt of notice that the Merit Systems Protection Board concurs in and adopts in whole the decision of the Commission; or

(f) If the Merit Systems Protection Board does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within thirty (30) calendar days of the receipt of notice of the decision of the Special Panel; or

(g) After one-hundred and twenty (120) calendar days from the date of filing a formal complaint if there is no agency action or appeal to the Merit Systems Protection Board; or

(h) After one-hundred and twenty (120) calendar days from the date of filing an appeal with the Merit Systems Protection Board if the Merit Systems Protection Board has not yet made a decision; or

(i) After one-hundred and eighty (180) calendar days from the date of filing a petition for consideration with the Commission if there is no decision by the Commission, reconsideration decision by the Merit Systems Protection Board or decision by the Special Panel.

(Civil Service Reform Act of 1978, (5 U.S.C. 7702))

[45 FR 50327, July 29, 1980]

Subpart E—Nondiscrimination on Account of Age

SOURCE: 39 FR 24351, July 2, 1974, unless otherwise noted. Redesignated at 43 FR 60901, Dec. 29, 1978.

GENERAL PROVISIONS

§ 1613.501 Purpose and applicability.

(a) *Purpose.* This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of age and the regulations under which an agency will process complaints of discrimination on account of age.

(b) *Applicability.* (1) This subpart applies (i) to military departments as defined in section 102 of title 5, United States Code, and Executive agencies as defined in section 105 of title 5, United States Code, the United States Postal Service and the Postal Rate Commission, and to the employees thereof, including employees paid from non-appropriated funds, and (ii) to those units of the legislative and judicial branches of the Federal Government and the Government of the District of Columbia having positions in the competitive service and to the employees of those positions. (2) This subpart does not apply to aliens employed outside the limits of the United States. (3) Except as provided by paragraph (b)(2) of this section, this subpart applies to applicants for positions to which paragraph (b)(1) of this section applies. (4) This subpart applies to employees and applicants for employment who are at least 40 years of age.

(c) *Exceptions.* Reasonable exemptions to the provisions of this subpart may be established by the Commission for each position for which the Commission establishes a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

[39 FR 24351, July 2, 1974, as amended at 42 FR 37530, July 22, 1977. Redesignated and amended at 43 FR 60901, Dec. 29, 1978]

§ 1613.502 General Policy.

It is policy of the Government of the United States (and of the government of the District of Columbia) to prohibit discrimination in employment on account of age to assure that all personnel actions affecting employees or applicants for employment are free from discrimination on account of age.

AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

§ 1613.511 General.

An Agency shall provide regulations governing the acceptance and processing of complaints of discrimination on account of age which, subject to § 1613.514, comply with the principles and requirements in §§ 1613.213 through 1613.222, 1613.241 and 1613.261 through 1613.271 of this part.

§ 1613.512 Coverage.

The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment with the agency who believes that he or she has been discriminated against on account of age and who, at the time of the action complained of, was an employee or applicant for employment at least 40 years of age. A complaint may also be filed by an organization for the person with his or her consent.

[43 FR 60901, Dec. 29, 1978]

§ 1613.513 Effect on Administrative Processing.

The filing of a civil action by an employee or applicant does not terminate agency processing of a complaint or Commission processing of an appeal under this subpart.

§ 1613.514 Exclusions.

Sections 1613.281 and 1613.282 shall not apply to the processing of discrimination complaints on account of age. The reference to § 1613.281 in §§ 1613.215, 1613.217, 1613.220, and

1613.221 may not be included in agency regulations required by this subpart.

[42 FR 19147, Apr. 12, 1977. Redesignated at 43 FR 60901, Dec. 29, 1978]

§ 1613.521 Appeal to the Commission.

Except for the requirements in § 713.234 that the decision of the Board of Review and Appeals contain a notice of the right to file a civil action in accordance with § 1613.282, §§ 1613.231 through 1613.236 of this part shall apply to this subpart.

Subpart F—Class Complaints of Discrimination

AUTHORITY: 42 U.S.C. 2000e-16(b), unless otherwise noted.

SOURCE: 42 FR 11808, Mar. 1, 1977, unless otherwise noted. Redesignated at 43 FR 60901, Dec. 29, 1978.

AGENCY REGULATIONS FOR PROCESSING CLASS COMPLAINTS OF DISCRIMINATION

§ 1613.601 Definitions.

(a) A "class" is a group of agency employees, former agency employees, and/or applicants for employment with the agency, on whose behalf it is alleged that they have been, are being, or may be adversely affected, by an agency personnel management policy or practice which the agency has authority to rescind or modify, and which discriminates against the group on the basis of their common race, color, religion, sex, national origin, and/or age.

(b) A "class complaint" is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:

(1) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(2) There are questions of fact common to the class;

(3) The claims of the agent of the class are typical of the claims of the class;

(4) The agent of the class, or his/her representative, if any, will fairly and adquately protect the interests of the class.

(c) An "agent of the class" is a class member who acts for the class during the processing of the class complaint.

(d) "Age" is an inclusive term which means the age of at least 40 years.

(86 Stat. 11; 29 U.S.C. 633a)

[42 FR 11808, Mar. 1, 1977, as amended at 42 FR 37530, July 22, 1977. Redesignated and amended at 43 FR 60901, Dec. 29, 1978]

§ 1613.602 Precomplaint processing.

(a) An employee or applicant who wishes to be an agent and who believes he/she has been discriminated against shall consult with an Equal Employment Opportunity Counselor within 90 calendar days of the matter giving rise to the allegation of individual discrimination or 90 calendar days of its effective date if a personnel action.

(b) The Counselor shall (1) advise the aggrieved person of the discrimination complaint procedures, of his/her right to representation throughout the precomplaint and complaint processes, and of the right to anonymity only during the precomplaint process; (2) make whatever inquiry is believed necessary; (3) make an attempt at informal resolution through discussion with appropriate officials; (4) counsel the aggrieved person concerning the issues involved; (5) inform the Equal Employment Opportunity Officer and other appropriate officials when corrective action is believed necessary; (6) keep a record of all counseling activities; and (7) summarize actions and advice in writing both to the Equal Employment Opportunity Officer and the aggrieved person concerning the issues in the personnel management policy or practice.

(c) The Counselor shall conduct a final interview and terminate counseling with the aggrieved person not later than 30 calendar days after the date on which the allegation of discrimination was called to the attention of the Counselor. During the final interview, the Counselor shall inform the aggrieved person in writing that counseling is terminated, that he/she has the right to file a class complaint of discrimination with appropriate officials of the agency, and that he/she has a duty to assure that the agency is immediately informed if legal representation is obtained.

(d) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint nor to encourage the person to file a complaint.

(e) The Counselor shall not reveal the identity of an aggrieved person during the period of consultation, except, when authorized to do so by the aggrieved person.

(f) The agency shall ensure that full cooperation is provided by all employees to Counselors in the performance of their duties under this section. Counselors shall have routine access to personnel records of the agency without unwarranted invasion of privacy.

(g) Corrective action taken as a result of counseling shall be consistent with law, Executive order, and Civil Service regulations, rules, and instructions.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, Reorganization Plan No. 1 of 1978 (43 FR 19807) and Executive Order 12106 (44 FR 1053))

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980]

§ 1613.603 Filing and presentation of a class complaint.

(a) The complaint must be sumbitted in writing by the agent or his/her representative and be signed by the agent.

(b) The complaint shall set forth specifically and in detail: (1) A description of the agency personnel management policy or practice giving rise to the complaint; and (2) a description of the resultant personnel action or matter adversely affecting the agent.

(c) The complaint must be filed not later than 15 calendar days after the agent's receipt of the notice of final interview with the Counselor.

(d) The officials with whom complaints may be filed are the head of the agency, a designee of the head of the agency, and the Director of Equal Employment Opportunity.

(e) A complaint shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by an official with whom complaints may be filed.

(f) At all stages, including counseling, in the preparation and presentation of a complaint, or claim and appeal from a decision on a complaint, or claim, the agent or claimant shall have the right to be accompanied, represented, and advised by a representative of his/her own choosing, provided the choice of a representative does not involve a conflict of interest or conflict of position. The representative shall be designated in writing and the designation made a part of the class complaint file.

(g) If the agent is an employee in an active duty status, he/she shall have a reasonable amount of official time to prepare and present his/her complaint. Employees, including attorneys, who are representing employees of the same agency in discrimination complaint cases must be permitted to use a reasonable amount of official time to carry out that responsibility whenever it is not inconsistent with the faithful performance of their duties. Although there is no requirement that an agency permit its own employees to use official time for the purpose of representing employees of other agencies, an agency may do so at its discretion. If the use of official time is not granted in such cases, employees may be granted, at their request, annual leave, or leave without pay.

§ 1613.604 Acceptance, Rejection or Cancellation.

(a) Within 10 calendar days of an agency's receipt of a complaint, the agency shall forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to a Complaints Examiner who may be an employee of the Federal Employee Appeals Authority and who is not an employee of the agency in which the complaint arose.

(b) The Complaints Examiner may recommend that the agency reject the complaint, or a portion thereof, for any of the following reasons:

(1) It was not timely filed;

(2) It consists of an allegation identical to an allegation contained in a previous compliant filed on behalf of the same class which is pending in the agency or which has been resolved or decided by the agency;

(3) It is not within the purview of this subpart;

(4) The agent failed to consult a Counselor in a timely manner;

(5) It lacks specificity and detail;

(6) It was not submitted in writing or was not signed by the agent;

(7) It does not meet the following prerequisites:

(i) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(ii) There are questions of fact common to the class;

(iii) The claims of the agent of the class are typical of the claims of the class;

(iv) The agent of the class, or his/her representative will fairly and adquately protect the interests of the class;

(c) If an allegation is not included in the Counselor's report, the Complaints Examiner shall afford the agent 15 calendar days to explain whether the matter was discussed and if not, why he/she did not discuss the allegation with the Counselor. If the explanation is not satisfactory, the Complaints Examiner may recommend that the agency reject the allegation. If the explanation is satisfactory, the Complaints Examiner may refer the allegation to the agency for further counseling of the agent.

(d) If an allegation lacks specificity and detail, the Complaints Examiner shall afford the agent 15 calendar days to provide specific and detailed information. The Complaints Examiner may recommend that the agency reject the complaint if the agent fails to provide such information within the specified time period. If the information provided contains new allegations outside the scope of the complaint, the Complaints Examiner must advise the agent how to proceed on an individual or class basis concerning these allegations.

(e) The Complaints Examiner may recommend that the agency extend the time limits for filing a complaint and for consulting with a Counselor when the agent, or his/her representative, shows that he/she was not notified of the prescribed time limits and was not otherwise aware of them or that he/she was prevented by circumstances beyond his/her control from acting within the time limit.

(f) When appropriate the Complaints Examiner may recommend that a class be divided into subclasses and that each subclass be treated as a class, and the provisions of this section then shall be construed and applied accordingly.

(g) The Complaints Examiner may recommend that the agency cancel a complaint after it has been accepted because of failure of the agent to prosecute the complaint. This action may be taken only after the Complaints Examiner has provided the agent a written request, including notice of proposed cancellation, that he/she provide certain information or otherwise proceed with the complaint, and the agent has failed to satisfy this request within 15 calendar days of his/her receipt of the request.

(h) An agent must be informed by the Complaints Examiner in a request under paragraphs (c) or (d) of this section that his/her complaint may be rejected if the information is not provided.

(i) The Complaints Examiner's recommendation to the agency on whether to accept, reject, or cancel a complaint shall be transmitted in writing to the agency, the agent, and the agent's representative. The Complaint Examiner's recommendation to accept, reject, or cancel shall become the agency decision unless the agency rejects or modifies the decision within 10 calendar days of its receipt. The agency shall notify the agent, the agent's representative, and the Complaints Examiner of its decision to accept, reject, or cancel a complaint. Notice of a decision to reject or cancel shall inform the agent of his/her right to proceed with his/her individual complaint of discrimination, and to appeal the final agency decision on the matter to the Office of Review and Appeals and of his/her right to file a civil action.

§ 1613.605 Notification and opting out.

(a) After acceptance of a class complaint, the agency, within 15 calendar days, shall use reasonable means, such as delivery, mailing, distribution, or posting, to notify all class members of the existence of the class complaint.

(b) A notice shall contain: (1) The name of the agency or organizational segment thereof, its location, and the date of acceptance of the complaint, (2) a description of the issues accepted as part of the class complaint; (3) an explanation that class members may remove themselves from the class by notifying the agency within 30 calendar days after issuance of the notice; and (4) an explanation of the binding nature of the final decision on or resolution of the complaint.

§ 1613.606 Avoidance of delay.

The complaint shall be processed promptly after it has been accepted. To this end, the parties shall proceed with the complaint without undue delay so that the complaint is processed within 180 calendar days after it was filed.

§ 1613.607 Freedom from restraint, interference, coercion, and reprisal.

(a) Agents, claimants, their representatives, witnesses, Directors of Equal Employment Opportunity, Equal Employment Opportunity Officers, Equal Employment Opportunity Investigators, Equal Employment Opportunity Counselors, and other agency officials having responsibility for the processing of discrimination complaints shall be free from restraint, interference, coercion, and reprisal at all stages in the presentation and processing of a complaint, including the counseling stage under § 1613.602, or any time thereafter.

(b) A person identified in paragraph (a) of this section, if a Federal employee or applicant, may file a complaint of restraint, interference, coercion, or reprisal in connection with the presentation and processing of a complaint of discrimination. The complaint shall be filed and processed in accordance with provisions of Subpart B.

§ 1613.608 Obtaining evidence concerning the complaint.

(a) *General.* (1) Upon the acceptance of a complaint, the agency head or his/her designee shall designate an agency representative. The agency representative shall not be an alleged discriminating official or any individual designated under § 1613.204(c) of this part.

(2) In representing the agency, the agency representative shall consult with officials, if any, named or identified as responsible for the alleged discrimination, and other officials of the agency as necessary. In such consultation, the agency representative will be subject to the provisions of Civil Service regulations, rules, and instructions concerning privacy and access to individual personnel records and reports.

(b) *Development of evidence.* (1) The Complaints Examiner shall notify the agent, or his/her representative and the agency representative that a period of not more than 60 calendar days will be allowed both parties to prepare their cases. This time period may be extended by the Complaints Examiner upon the request of either party. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint. Evidence may be developed through interrogatories, depositions, and requests for production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(2) In the event that mutual cooperation fails, either party may request the Complaints Examiner to rule on a request to develop evidence. When the Complaints Examiner renders his/her report of findings and recommendations on the merits of the complaint, a party's failure to comply with the Complaints Examiner's ruling on an evidentiary request may be taken into account.

(3) During the time period for development of evidence, the Complaints Examiner may, in his/her discretion, direct that an investigation of facts relevant to the complaint, or any portion thereof, be conducted by an In-

vestigator trained and/or certified by the Commission.

(4) Both parties shall furnish the Complaints Examiner all materials which they wish him/her to examine and such other material as he/she may request.

§ 1613.609 Opportunities for resolution of the complaint.

(a) The Complaints Examiner shall furnish the agent or his/her representative and the representative of the agency a copy of all materials obtained concerning the complaint and provide opportunity for the agent to discuss materials with the agency representative and attempt resolution of the complaint.

(b) At any time after acceptance of a complaint, the complaint may be resolved by agreement of the agency and the agent to terms offered by either party.

(c) If resolution of the complaint is arrived at, the terms of the resolution shall be reduced to writing, and signed by the agent and the agency head or his/her designee. A resolution may include a finding on the issue of discrimination, an award of attorney's fees or costs, and must include any corrective action agreed upon. Corrective action in the resolution must be consistent with law, Executive order, and Civil Service regulations, rules, and instructions. A copy of the resolution shall be provided to the agent.

(d) Notice of the resolution shall be given to all class members in the same manner as notification of the acceptance of the class complaint and shall state the terms of corrective action, if any, to be granted by the agency. A resolution shall bind all members of the class.

(e) If the agency does not carry out, or rescinds, any action specified by the terms of the resolution for any reason not attributable to acts or conduct of the agent, his/her representative, or class members, the agency upon the agent's written request shall reinstate the complaint for further processing from the point processing ceased under the terms of the resolution. Failure of the agency to reinstate the complaint is grounds for appeal by the agent to the Appeals Review Board.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, Reorganization Plan No. 1 of 1978 (43 FR 19807) and Executive Order 12106 (44 FR 1053))

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980]

§ 1613.610 Hearing.

On the expiration of the period allowed for preparation of the case, the Complaints Examiner shall set a date for a hearing. The hearing shall be conducted in accordance with 5 CFR 772.307(c).

§ 1613.611 Report of findings and recommendations.

(a) The Complaints Examiner shall transmit to the agency head or his/her designee: (1) The record of the hearing; (2) his/her findings and analysis with regard to the complaint; and (3) his/her report of findings and recommended decision on the complaint, including corrective action pertaining to systemic relief for the class and any individual corrective action, where appropriate, with regard to the personnel action or matter which gave rise to the complaint.

(b) The Complaints Examiner shall notify the agent of the date on which the report of findings and recommendations was forwarded to the agency head or his/her designee.

§ 1613.612 Agency decision.

(a)(1) Within 30 calendar days of receipt of the report of findings and recommendations issued under § 1613.611, the agency head or his/her designee shall issue a decision to accept, reject, or modify the findings and recommendations of the Complaints Examiner.

(2) The decision of the agency shall be in writing and shall be transmitted to the agent of his/her representative, along with a copy of the record of the hearing and a copy of the findings and recommendations of the Complaints Examiner.

(3) When the agency's decision is to reject or modify the findings and recommendations of the Complaints Examiner the decision shall contain the specific reasons in detail for the agency's action.

(b) If the agency has not issued a decision within 30 calendar days of its receipt of the Complaints Examiner's report of findings and recommendations, the findings and recommendations shall become the final agency decision. The agency shall transmit the final agency decision and the record of the hearing to the agent or his/her representative within 5 calendar days of the expiration of the 30-day period.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issue of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall (1) advise the agent and his or her representative that any request for attorney's fees must be documented and submitted within 20 calendar days of receipt, (2) review the matter giving rise to the complaint to determine whether disciplinary action against alleged discriminatory officials is appropriate, and (3) record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be recorded in the complaint file.

(d) When the final agency decision provides for an award of attorney's fees and/or costs, the amount of these awards shall be determined under § 1613.271(c). When the agency determines not to award attorney's fees or costs, the agency shall set forth in its decision the specific reasons for denying the award.

(e) The agency shall inform the agent or his/her representative of the right to appeal the final agency decision to the Commission's Office of Review and Appeals and his/her right to file a civil action in accordance with § 1613.641 of the regulations, and of the time limits applicable thereto.

(f) A final agency decision on a class complaint shall be binding on all members of the class and the agency.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, Reorganization Plan No. 1 of 1978 (43 FR 19807) and Executive Order 12106 (44 FR 1053))

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980]

§ 1613.613 Notification of class members of decision.

Class members shall be notified by the agency, through the same media employed to give notice of the existence of the class complaint, of the agency decision and corrective action, if any. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief, and of the procedures to be followed. Notice shall be given by the agency within 10 calendar days of the transmittal of its decision to the agent.

§ 1613.614 Corrective action.

(a) When discrimination is found, an agency must eliminate or modify the personnel policy or practice out of which the complaint arose, and provide individual corrective action, including an award of attorney's fees and costs, to the agent in accordance with § 1613.271 of this part. Corrective action in all cases must be consistent with law, Executive order, and Civil Service regulations, rules and instructions.

(b) When discrimination is found and a class member believes that but for that discrimination he/she would have received employment or an employment benefit, the class member may file a written claim with the head of the agency or the Director of Equal Employment Opportunity of the agency within 30 calendar days of notification by the agency of the decision of the agency.

(c) The claim must include a specific, detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice within not more than 135 calendar days preceding the filing of the class complaint.

(d) The agency shall attempt to resolve the claim for relief within 60 calendar days after the date the claim was postmarked, or, in the absence of a postmark, within 60 calendar days after the date it was received by an official with whom claims may be filed. If the agency and claimant do not agree that the claimant is a member of the class or upon the relief to which the claimant is entitled, the agency shall refer the claim, with recommendations concerning it, to the Complaints Examiner.

(e) The Complaints Examiner shall notify the claimant of the right to a hearing on the claim and shall allow the parties to the claim an opportunity to submit evidence and representations concerning the claim. If a hearing is requested, it shall be conducted in accordance with 5 CFR 772.307(c). If no hearing is requested, the Complaints Examiner, in his/her discretion, may hold a hearing to obtain necessary evidence concerning the claim.

(f) The Complaints Examiner shall issue a report of findings and recommendations on the claim which shall be treated the same as a report of findings and recommendations under §§ 1613.611 and 1613.612.

(g) If the Complaints Examiner determines that the claimant is not a member of the class or that the claim was not timely filed he/she shall recommend rejection of the claim and give notice of his/her action to the agency, the claimant, and his/her representative. Such notice shall include advice as to the complainant's right to appeal to the Office of Review and Appeals or to file a civil action in accordance with the provisions of this part.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, Reorganization Plan No. 1 of 1978 (43 FR 19807) and Executive Order 12106 (44 FR 1053))

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980]

APPEAL TO THE COMMISSION

§ 1613.631 Appeal to the Office of Review and Appeals.

(a) An agent may appeal to the Office of Review and Appeals the decision of the head of the agency or his/her designee: (1) To reject or cancel his/her complaint, or a portion thereof; for reasons covered by § 1613.604; (2) to refuse to reinstate the complaint for further processing in accordance with the provisions of § 1613.609(e); and (3) on the merits of the complaint, the issue of attorney's fees and costs and/or corrective action.

(b) A claimant may appeal to the Office of Review and Appeals from a decision of the head of the agency or his/her designee: (1) To cancel or reject a claim for individual relief in accordance with § 1613.614(f) and (g); and (2) on the merits of his/her claim for individual relief including attorney's fees or costs.

(c) An appeal may be filed at any time after receipt of the agency's final decision, but not later than 15 calendar days after receipt of that decision except when the appellant shows that he/she or his/her representative was not notified of the prescribed time limit and was not otherwise aware of it, or that he/she or his/her representative was prevented by circumstances beyond his/her control from appealing within the prescribed time limit.

(d) An appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the Office of Review and Appeals. The Office of Review and Appeal's review will be made upon the existing record to determine if the agency decision is in accord with applicable law, Executive order, or Civil Service regulations, rules, and instructions and is supported by substantial evidence.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, Reorganization Plan No. 1 of 1978 (43 FR 19807) and Executive Order 12106 (44 FR 1053))

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980]

§ 1613.632 Reopening and reconsideration by the Commissioners.

The Commissioners may reopen and reconsider any previous decision of a Commission office on their own motion or at the request of either party in accordance with provisions of 5 CFR 772.312(a)(1).

CIVIL ACTIONS

§ 1613.641 Statutory right.

(a) An agent who has filed a complaint or a claimant who has filed a claim for relief based on race, color, religion, sex, and/or national origin discrimination is authorized to file a civil action in an appropriate U.S. district court:

(1) Within 30 calendar days of his/her receipt of notice of final action taken by his/her agency on a complaint or claim;

(2) After 180 calendar days from the date he/she filed a complaint or claim with his/her agency if there has been no decision on the complaint or claim;

(3) Within 30 calendar days of his/her receipt of the decision of the Office of Review and Appeals on his/her appeal; or

(4) After 180 calendar days from the date he/she filed an appeal with the Office of Review and Appeals, if there has been no Office of Review and Appeals decision.

For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees and costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

(b) An agent who filed a complaint or a claimant who has filed for relief based on age discrimination, is authorized to file a civil action in an appropriate U.S. district court.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, Reorganization Plan No. 1 of 1978 (43 FR 19807) and Executive Order 12106 (44 FR 1053))

[37 FR 22717, Oct. 21, 1972. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 24133, Apr. 9, 1980]

§ 1613.642 Notice of right.

When the agent alleges that the agency discriminated against a class on the basis of race, color, religion, sex, national origin, and/or age, or a claimant files for relief, the agency or the Commission shall notify him/her of his/her right to file a civil action in any final action on a complaint, or claim, under §§ 1613.604, 1613.612, 1613.614, or 1613.631.

§ 1613.643 Effect on administrative processing.

The filing of a civil action by an agent or claimant does not terminate agency processing of a complaint or claim or Office of Review and Appeals processing of an appeal under this subpart.

Subpart G—Prohibition Against Discrimination Because of a Physical or Mental Handicap.

AUTHORITY: 5 U.S.C. 7153; § 5.1 of the Civil Service Rules; 29 U.S.C. 791, unless otherwise noted.

SOURCE: 43 FR 12295, Mar. 24, 1978. Redesignated at 43 FR 60901, Dec. 29, 1978, unless otherwise noted.

GENERAL PROVISIONS

§ 1613.701 Purpose and applicability.

(a) *Purpose.* This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of physical or mental handicap and the regulations under which an agency will process complaints of discrimination based on a physical or mental handicap.

(b) *Applicability.* (1) This subpart applies to executive agencies as defined in section 105 of Title 5 of the United States Code and to those positions in the legislative and judicial branches of the Federal Government and the government of the District of Columbia which are in the competitive service. (2) This subpart applies to the U.S. Postal Service and Postal Rate Commission. (3) This subpart applies only to applicants and employees who have a handicap as defined in § 1613.702(a).

§ 1613.702 Definitions.

(a) "Handicapped person" is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

(b) "Physical or mental impairment" means (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(c) "Major life activities" means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(d) "Has a record of such an impairment" means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities.

(e) "Is regarded as having such an impairment" means (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in (b) of this section but is treated by an employer as having such an impairment.

(f) "Qualified handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used: (1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

§ 1613.703 General policy.

Agencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person.

§ 1613.704 Reasonable accommodation.

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

§ 1613.705 Employment criteria.

(a) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the agency, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Civil Service Commission's Director of Personnel Research and Development Center to be available.

(b) An agency shall select and administer tests concerning employment so as to insure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's ability to perform the position or type of positions in question rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 1613.706 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, an agency may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. An agency may, however, make preemployment inquiry into an applicant's ability to meet the medical qualification requirements, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Civil Service Commission may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

(b) Nothing in this section shall prohibit an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided,* That: (1) All entering employees are subjected to such an examination regardless of handicap or when the preemployment medical questionnaire used for positions which do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition, and (2) the results of such an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of preemployment medical information for the purposes of special appointing authorities for handicapped persons.

(c) To enable and evaluate affirmative action to hire, place, or advance handicapped individuals, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped, if: (1) The agency states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in conjunction with affirmative action and (2) the agency states clearly that the information is being requested on a voluntary basis, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be kept confidential except that: (1) Managers, selecting officials, and others involved in the selection process or responsible for affirmative action may be informed that the applicant is a handicapped individual eligible for affirmative action; (2) supervisors and managers may be informed regarding necessary accommodations; (3) first aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; (4) government officials investigating compliance with laws, regulations, and instructions relevant to equal employment opportunity and affirmative action for handicapped individuals shall be provided information upon request; and (5) statistics generated from information obtained may be used to manage, evaluate, and report on equal employment opportunity and affirmative action programs.

(29 U.S.C. 791, Reorganization Plan No. 1 of 1978 (43 FR 19807, May 9, 1978), and Executive Order 12106 (44 FR 1053, Jan. 3, 1979))

[43 FR 12295, Mar. 24 1978. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 46 FR 11285, Feb. 6, 1981]

§ 1613.707 Physical access to buildings.

(a) An agency shall not discriminate against qualified handicapped applicants or employees due to the inaccessibility of its facility.

(b) For the purpose of this subpart, a facility shall be deemed accessible if it is in compliance with the Architectural Barriers Act of 1968.

AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

§ 1613.708 General.

An agency shall provide regulations governing the acceptance and processing of complaints of discrimination based on a physical or mental handicap which comply with the principles and requirements in §§ 1613.213 through 1613.283 and §§ 1613.601 through 1613.643. Nothing in the foregoing shall be construed to postpone the effective date of this rule.

(Secs. 501 and 505 of the Rehabiliation Act of 1973, as amended, 29 U.S.C. 791 and 794a, Reorganization Plan No. 1 of 1978 (43 FR 19807), and Executive Order 12106 (44 FR 1053))

[46 FR 51384, Oct. 20, 1981]

§ 1613.709 Coverage.

(a) An agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against because of a handicap as defined in § 1613.702.

(b) An agency must process complaints of discrimination based on acts or actions that occurred 1 year prior to the effective date of these regulations *Provided:* (1) The complaint of discrimination was brought to the attention of the agency within 30 calendar days of the alleged discriminatory act, or, if a personnel action, within 30 calendar days of its effective date, (2) the complaint of discrimination was not adjudicated under some other grievance or appeals procedure, and (3) the complaint of discrimination is filed within 180 calendar days of the effective date of these regulations. Complaints of discrimination based on alleged discriminatory acts or personnel actions that occurred on or after the effective date of these regulations are subject to the time restraints set forth in § 1613.214(a).

(c) Notwithstanding the provision of subsection (b), a complainant may request an agency to process allegations of handicap discrimination which had been filed as a discrimination complaint or as a grievance, and were pending with the agency, the Civil Service Commission or in a Federal Court on April 10, 1978. Such requests for processing of allegations of handicap discrimination must be brought to the attention of the agency EEO counselor not later than 180 days from the publication of this subsection in final form in the FEDERAL REGISTER.

[43 FR 12295, Mar. 24, 1978. Redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 41634, June 20, 1980]

Subpart H—Regulations for Processing Appealable Actions, Alleging Prohibited Discrimination, Pending on or Before January 10, 1979

AUTHORITY: 42 U.S.C. 2000e-16; 29 U.S.C. 633a; 29 U.S.C. 791; Reorganization Plan No. 1 of 1978.

SOURCE: 44 FR 50541, Aug. 28, 1979, unless otherwise noted.

§ 1613.801 Scope.

This subpart establishes regulations for the processing of an allegation that an action otherwise appealable to the Merit Systems Protection Board (the Board) was based in whole or in part on discrimination because of race, color, religion, sex, national origin, age, or handicap. This subpart applies only to administrative procedures pending before January 11, 1979, to which Section 205 of the Civil Service Reform Act of 1978, 5 U.S.C. 7702, is inapplicable.

§ 1613.802 Definitions.

(a) As used in this section, the term "prohibited discrimination" means discrimination prohibited by Section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16); Section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791); and Sections 12 and 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 631 and 633a).

(b) As used in this section, the term "initial decision" means a decision on an appeal, rendered by a presiding official of the Board pursuant to 29 CFR

Part 1613 or 5 CFR Part 772 (as in effect prior to January 11, 1979), in which issues of prohibited discrimination have been raised.

(c) As used in this section, the term "preliminary decision" means (1) an initial decision within the meaning of § 1613.802(b), which has not been reopened by a Board member or as to which no petition to reopen was filed by a party within 35 days after issuance of the decision; or (2) a decision by the Board itself pursuant to 29 CFR Part 1613 or 5 CFR Part 772 (as in effect prior to January 11, 1979), in which issues of prohibited discrimination are addressed, or a decision by the Board denying all petitions to reopen.

§ 1613.803 Election.

An appellant who alleges that an action otherwise appealable to the Board was based in whole or in part on prohibited discrimination shall elect to proceed under 29 CFR Part 1613 (43 FR 60901, formerly 5 CFR 713) or under 5 CFR Part 772 (as in effect prior to January 11, 1979). This section is applicable only to persons who had not previously made an election under regulations of the former Civil Service Commission.

§ 1613.804 Election of Part 1613.

(a) When an appellant elects or has elected to proceed under 29 CFR Part 1613 (43 FR 60901, formerly 5 CFR Part 713) the provisions of Part 1613 are applicable to that proceeding.

(b) The Commission hereby delegates to the Merit Systems Protection Board the authority to make initial and preliminary decisions on issues of prohibited discrimination in appeals from final agency decisions under 29 CFR Part 1613 (43 FR 60901, formerly 5 CFR Part 713).

§ 1613.805 Election of Part 772.

(a) When a complainant elects or has elected to proceed under 5 CFR Part 772, the allegations of discrimination shall be referred to the EEO Officer of the agency for investigation in accordance with 29 CFR 1613.216 (43 FR 60901, formerly 5 CFR 713.216).

(b) The Commission hereby delegates to the Merit Systems Protection Board the authority to make initial and preliminary decisions on issues of prohibited discrimination in appeals from final agency decisions under 5 CFR Part 772.

§ 1613.806 Petition to EEOC; finality of decisions.

(a) A petition to review the preliminary decision of the Board shall be filed in writing with the Office of Review and Appeals, EEOC, 2401 E Street, N.W., Washington, D.C. 20506 (1) within 35 days after the initial decision of the Board becomes a preliminary decision (as contemplated in § 1613.802(c)(1)) or (2) within 35 days after the issuance of a preliminary decision by the Board.

(b) A decision of the EEOC on a petition to review the preliminary decision of the Board shall be final when issued.

(c) If a petition to review is not timely filed with the EEOC, the preliminary decision of the Board shall become final on all issues on the day after the expiration of the 35-day period for filing with EEOC, unless the EEOC chooses to exercise its discretion under the standards of 29 CFR 1613.233(b) and accept the late petition.

PART 1620—THE EQUAL PAY ACT

Sec.
1620.19 Investigation and compliance assistance.
1620.20 Issuance of Subpoenas.
1620.21 Recordkeeping requirements.
1620.22 Recovery of wages due; injunctions; penalties for willful violations.
1620.23 Rules to be liberally construed.

AUTHORITY: Sec. 1-19, 52 Stat. 1060, as amended; Sec. 10, 61 Stat. 84; Pub. L. 88-38, 77 Stat. 56 (29 U.S.C. 201 et seq.); sec. 1, Reorg. Plan No. 1 of 1978, 43 FR 19807: Executive Order No. 12144, 44 FR 37193.

SOURCE: 46 FR 4888, Jan. 19, 1981, unless otherwise noted.

§ 1620.19 Investigations and compliance assistance.

(a) As provided in sections 9, 11, 16, and 17 of the FLSA, the Commission and its authorized representatives under the Act may (1) investigate and gather data; (2) enter and inspect establishments and records, and make transcriptions thereof, and interview individuals; (3) advise employers regarding any changes necessary or desirable to comply with the Act; (4) subpoena witnesses and order production of documents and other evidence; (5) supervise the payment of amounts owing pursuant to section 16(c) of the FLSA; (6) initiate and conduct litigation.

(b) The General Counsel, District Directors, and the Program Director, Office of Program Operations, or the designees of any of them are hereby delegated authority to exercise the powers enumerated in paragraphs (a) (1), (2), (3), and (5) of this section and to serve subpoenas. The General Counsel is delegated authority to seek preliminary relief under the Act. The General Counsel is hereby delegated authority to initiate other litigation at the direction of the Commission and to conduct such litigation.

(c) The identity or identifying details of persons giving information as to violations of the Act shall not be disclosed unless necessary in a court proceeding.

[46 FR 4888, Jan. 19, 1981, as amended at 47 FR 46276, Oct. 18, 1982]

§ 1620.20 Issuance of subpoenas.

(a) With respect to the enforcement of the Equal Pay Act, any member of the Commission shall have the authority to sign a subpoena requiring:

(1) The attendance and testimony of witnesses;

(2) The production of evidence including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpoenaed; and

(3) Access to evidence for the purposes of examination and the right to copy.

(b) There is no right of appeal to the Commission from the issuance of such a subpoena.

(c) Upon the failure of any person to comply with a subpoena issued under this section, the Commission may utilize the provisions of sections 49 and 50 of Title 15 of the United States Code to compel enforcement of the subpoena.

§ 1620.21 Recordkeeping requirements.

(a) Employers having employees subject to the Act are required to keep records in accordance with U.S. Department of Labor regulations found at 29 CFR Part 516 (Records To Be Kept by Employers Under the FLSA). The regulations of that part are adopted herein by reference.

(b) Every employer subject to the equal pay provisions of the Act shall maintain and preserve all records required by the applicable sections of 29 CFR Part 516 and in addition, shall preserve any records which he makes in the regular course of his business operation which relate to the payment of wages, wage rates, job evaluations, job descriptions, merit systems, seniority systems, collective bargaining agreements, description of practices or other matters which describe or explain the basis for payment of any wage differential to employees of the opposite sex in the same establishment, and which may be pertinent to a determination whether such differential is based on a factor other than sex.

(c) Each employer shall preserve for at least two years the records he makes of the kind described in § 1620.21(b) which explain the basis for payment of any wage differential to employees of the opposite sex in the same establishment.

(Approved by the Office of Management and Budget under control number 3046-0019)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[46 FR 4888, Jan. 19, 1981, as amended at 46 FR 63268, Dec. 31, 1981]

§ 1620.22 Recovery of wages due; injunctions; penalties for willful violations.

(a) Wages withheld in violation of the Act have the status of unpaid minimum wages or unpaid overtime compensation under the FLSA. This is true both of the additional wages required by the Act to be paid to an employee to meet the equal pay standard, and of any wages that the employer should have paid an employee whose wages he reduced in violation of the Act in an attempt to equalize his or her pay with that of an employee of the opposite sex performing equal work, on jobs subject to the Act.

(b) The following methods are provided under sections 16 and 17 of the FLSA for recovery of unpaid wages: The Commission may supervise payment of the back wages and may bring suit for back pay and an equal amount as liquidated damages. The employee may sue for back pay and an additional sum, up to the amount of back pay, as liquidated damages, plus attorney's fees and court costs. The employee may not bring suit if he or she has been paid back wages in full under supervision of the Commission, or if the Commission has filed suit under the Act to collect the wages due the employee. The Commission may also obtain a court injunction to restrain any person from violating the law, including the unlawful withholding by an employer of proper compensation. A 2-year statute of limitations applies to the recovery of unpaid wages, except that an action on a cause of action arising out of a willful violation may be commenced within 3 years after the cause of action accrued.

(c) Willful violations of the Act may be prosecuted criminally and the violator fined up to $10,000. A second conviction for such a violation may result in imprisonment.

(d) Violation of any provision of the Act by any person, including any labor organization or agent thereof, is unlawful, as provided in section 15(a) of the FLSA. Accordingly, any labor organization, or agent thereof, who violates any provision of the Act is subject to injunction proceedings in accordance with the applicable provisions of section 17 of the FLSA. Any such labor organization, or agent thereof, who willfully violates the provisions of section 15 is liable to the penalties set forth in section 16(a) of the FLSA.

§ 1620.23 Rules to be liberally construed.

(a) These rules and regulations shall be liberally construed to effectuate the purpose and provisions of this Act and any other Act administered by the Commission.

(b) Any person claiming to be aggrieved or the agent for such person may advise the Commission of the statute or statutes under which he or she wishes the Commission to commence its inquiry.

(c) Whenever the Commission is investigating a charge or allegation relating to a possible violation of one of the statutes which it administers and finds a violation of one or more of the other statutes which it administers, the Commission may seek to remedy such violation in accordance with the procedures of all relevant statutes.

PART 1621—PROCEDURES—THE EQUAL PAY ACT

Sec.

1621.1 Purpose.
1621.2 Definitions.
1621.3 Procedure for requesting an opinion letter.
1621.4 Effect of opinions and interpretations of the Commission.

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended, Secs. 10-16, 61 Stat. 84, Pub. L. 88-38, 77 Stat. 56 (29 U.S.C. 201 *et seq.*); Sec. 1, Reorgan. Plan No. 1 of 1978, 43 FR 19807; Executive Order No. 12144, 44 FR 37193.

SOURCE: 49 FR 31411, Aug. 7, 1984, unless otherwise noted.

§ 1621.1 Purpose.

The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for issuing opinion letters under the Equal Pay Act.

§ 1621.2 Definitions

For purposes of this part, the term "the Act" shall mean the Equal Pay Act the "Commission" shall mean the Equal Employment Opportunity Commission or any of its designated representatives.

§ 1621.3 Procedure for requesting an opinion letter.

(a) A request for an opinion letter should be submitted in writing to the Chairman, Equal Employment Opportunity Commission, 2401 E Street, NW., Washington, D.C. 20507, and shall contain:

(1) A concise statement of the issues for which an opinion is requested;

(2) A full statement of the relevant facts and law; and

(3) The names and addresses of the person(s) making the request and other interested persons.

(b) Issuance of an opinion letter by the Commission is discretionary.

(c) Informal advice: When the Commission, at its discretion, determines that it will not issue an opinion letter as defined in § 1621.4, the Commission may provide informal advice or guidance to the requestor. An informal letter of advice does not represent the formal position of the Commission and does not commit the Commission to the views expressed therein. Any letter other than those defined in § 1621.4 will be considered a letter of advice and may not be relied upon by any employer within the meaning of Section 10 of the Portal to Portal Act of 1947, 29 U.S.C. 255.

§ 1621.4 Effect of opinions and interpretations of the Commission.

(a) Section 10 of the Portal to Portal Act of 1947, 29 U.S.C. 255, which applies to the Equal Pay Act of 1963, 29 U.S.C. 206(d), provides that:

> In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment * * * if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval or interpretation * * * or any administrative practice or enforcement policy of [the Commission].

The Commission has determined that only the following documents may be relied upon by any employer as a "ruling, approval or interpretation" or as "evidence of any administrative practice or enforcement policy" of the Commission within the meaning of the statutory provisions quoted above.

(1) A written document, entitled "opinion letter," signed by the Legal Counsel on behalf of and as approved by the Commission;

(2) A written document issued in the conduct of litigation, entitled "opinion letter," signed by the General Counsel on behalf of and as approved by the Commission;

(3) A matter published and specifically designated as such in the FEDERAL REGISTER.

(b) An opinion letter issued pursuant to § 1621.4 (a)(1) or (a)(2) above, when issued to a specific addressee, has no effect upon circumstances beyond the situation of the specific addressee.

PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

Subpart A—Interpretations

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1625.20 Employer obligations under Section 4(g) of the Act.

AUTHORITY: 81 Stat. 602; 29 U.S.C. 621, 5 U.S.C. 301, Secretary's Order No. 10-68; Secretary's Order No. 11-68, and sec. 2; Reorg. Plan No. 1 of 1978, 43 FR 19807.

SOURCE: 46 FR 47726, Sept. 29, 1981, unless otherwise noted.

Subpart A—Interpretations

§ 1625.1 Definitions.

The Equal Employment Opportunity Commission is hereinafter referred to as the "Commission". The terms "person", "employer", "employment agency", "labor organization", and "employee" shall have the meanings set forth in Section 11 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.*, hereinafter referred to as the "Act". References to "employers" in this part state principles that are applicable not only to employers but also to labor organizations and to employment agencies.

§ 1625.2 Discrimination between individuals protected by the Act.

(a) It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals within the 40-70 age bracket. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.

(b) The extension of additional benefits, such as increased severance pay, to older employees within the protected age bracket may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination. The extension of those additional benefits may not be used as a means to accomplish practices otherwise prohibited by the Act.

§ 1625.3 Employment agency.

(a) As long as an employment agency regularly procures employees for at least one covered employer, it qualifies under section 11(c) of the Act as an employment agency with respect to all of its activities whether or not such activities are for employers covered by the act.

(b) The prohibitions of section 4(b) of the Act apply not only to the referral activities of a covered employment agency but also to the agency's own employment practices, regardless of the number of employees the agency may have.

§ 1625.4 Help wanted notices or advertisements.

(a) When help wanted notices or advertisements contain terms and phrases such as "age 25 to 35," "young," "college student," "recent college graduate," "boy," "girl," or others of a similar nature, such a term or phrase deters the employment of older persons and is a violation of the Act, unless one of the exceptions applies. Such phrases as "age 40 to 50," "age over 65," "retired person," or "supplement your pension" discriminate against others within the protected group and, therefore, are prohibited unless one of the exceptions applies.

(b) The use of the phrase "state age" in help wanted notices or advertisements is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination based on age, employment notices or advertisements which include the phrase "state age," or any similar term, will be closely scrutinized to assure that the request is for a lawful purpose.

§ 1625.5 Employment applications.

A request on the part of an employer for information such as "Date of Birth" or "State Age" on an employment application form is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination based on age, employment application forms which request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act. That the purpose is not one proscribed by the statute should be made known to the applicant, either by a reference on the application form to the statutory prohibition in language to the following effect: "The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 but less than 70 years of age," or by other means. The term "employment applications," refers to all written inquiries about employment or applications for employment or promotion including, but not limited to, résumés or other summaries of the applicant's background. It relates not only to written preemployment inquiries, but to inquiries by employees concerning terms, conditions, or privileges of employment as specified in section 4 of the Act.

§ 1625.6 Bona fide occupational qualifications.

(a) Whether occupational qualifications will be deemed to be "bona fide" to a specific job and "reasonably necessary to the normal operation of the particular business, " will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception to the Act it must be narrowly construed.

(b) An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

(c) Many State and local governments have enacted laws or administrative regulations which limit employment opportunities based on age. Unless these laws meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act, they will be considered in conflict with and effectively superseded by the ADEA.

§ 1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that

> * * * it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * *.

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at Part 1607 of this title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the Act.

§ 1625.8 Bona fide seniority systems.

Section 4(f)(2) of the Act provides that

> * * * It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of a bona fide seniority system * * * which is not a subterfuge to evade the purposes of this Act except that no such seniority system * * * shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual. * * *

(In the case of employees covered by a collective bargaining agreement which was in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act), the provisions of this section with respect to involuntary retirement of individuals between the ages of 65 and 70 were effective upon the termination of the collective bargaining agreement or January 1, 1980, whichever occurred first.) (See also § 1625.9 (d) (e), and (f).)

(a) Though a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers.

(b) Adoption of a purported seniority system which gives those with longer service lesser rights, and results in discharge or less favored treatment to those within the protection of the Act, may, depending upon the circumstances, be a "subterfuge to evade the purposes" of the Act.

(c) Unless the essential terms and conditions of an alleged seniority system have been communicated to the affected employees and can be shown to be applied uniformly to all of those affected, regardless of age, it will not be considered a bona fide seniority system within the meaning of the Act.

(d) It should be noted that seniority systems which segregate, classify, or otherwise discriminate against individuals on the basis of race, color, religion, sex, or national origin, are prohibited under Title VII of the Civil Rights Act of 1964, where that Act otherwise applies. The "bona fides" of such a system will be closely scrutinized to ensure that such a system is, in fact, bona fide under the ADEA.

§ 1625.9 Prohibition of involuntary retirement.

(a)(1) As originally enacted in 1967, section 4(f)(2) of the Act provided: "It shall not be unlawful * * * to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *." The Department of Labor interpreted the provision as "Authoriz[ing] involuntary retirement irrespective of age: *Provided*, That such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2)." *See* 29 CFR 860.110(a), 34 FR 9709 (June 21, 1969). The Department took the position that in order to meet the requirements of section 4(f)(2), the involuntary retirement provision had to be (i) contained in a bona fide pension or retirement plan, (ii) required by the terms of the plan and not optional, and (iii) essential to the plan's economic survival or to some other legitimate business purpose—i.e., the provision was not in the plan as the result of arbitrary discrimination on the basis of age.

(2) As revised by the 1978 amendments, section 4(f)(2) was amended by adding the following clause at the end: "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual * * *." The Conference Committee Report expressly states that this amendment is intended "to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age" (H.R. Rept. No. 95-950, p. 8).

(b)(1) The amendment applies to all new and existing seniority systems and employee benefit plans. Accordingly, any system or plan provision requiring or permitting involuntary retirement is unlawful, regardless of whether the provision antedates the 1967 Act or the 1978 amendments.

(2) Where lawsuits pending on the date of enactment (April 6, 1978) or filed thereafter challenge involuntary retirements which occurred either before or after that date, the amendment applies.

(c) The amendment protects all individuals covered by section 12(a) of the Act. Accordingly, before January 1, 1979 (the effective date of the amendment to section 12(a) which raised the upper age limit to 70), the amendment applied to individuals who were at least 40 years of age but less than 65 years of age. On and after that date it applies also to individuals who are at least 65 years of age but less than 70 years of age, unless otherwise exempt.

(d)(1) To allow time for the adjustment of collective bargaining agreements, the 1978 amendments provide that

> * * * in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938), and which would otherwise be prohibited by the amendment (to section 12 of the Act), the amendment (to section 4(f)(2) of the Act) shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first * * *

(Pub. L. 95-256, section 2(b), 92 Stat. 189)

(2) This delay of up to one year in the effective date of the amendment to section 4(f)(2) applies only to the protection afforded against involuntary retirement and affects only individuals who have attained 65 years of age but not 70 years of age on and after January 1, 1979. Such individuals may not be involuntarily retired unless (i) the retirement age specified in the plan is 65 or above; (ii) the retirement is authorized by the express terms of a bona fide seniority system or a bona fide employee benefit plan which is not a subterfuge to evade the purposes of the Act; and (iii) those terms have been adopted no later than September 1, 1977 and are pursuant to a collective bargaining agreement in effect on September 1, 1977. "Bona fide" shall have the same meaning as in § 860.120(b), as amended, 44 FR 30658 (May 25, 1979).

(3) Where a collective bargaining agreement expired prior to September 1, 1977, and a new agreement was signed subsequent to that date effective retroactively to the expiration date of the previous agreement, the exemption does not apply. The expressed congressional intent was to exempt only those agreements which had been "negotiated" before September 1, 1977 (see S. Rept. No. 95-493, 95th Cong., 1st Sess. (1977), p. 11; H.R. Rept. No. 95-527, Part 1, 95th Cong., 1st Sess. (1977), pp. 8-9).

(e) The exemption of up to one year is inapplicable after the expiration of the collective bargaining agreement in effect on September 1, 1977, whether or not the agreement is extended or renewed. The exemption is in no event applicable after January 1, 1980.

(f) Neither section 4(f)(2) nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option. Nor is it unlawful for a plan to require early retirement for reasons other than age.

§ 1625.10 Reserved for costs and benefits under employee benefit plans.

For currently applicable interpretations, see 29 CFR 860.120.

§ 1625.11 Exemption for employees serving under a contract of unlimited tenure.

(a)(1) Section 12(d) of the Act, added by the 1978 amendments, provides: "Nothing in this act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965)."

(2) This exemption from the Act's protection of covered individuals took effect on January 1, 1979, and is repealed on July 1, 1982 (see sections 3(b)(1) and 3(b)(3) of the Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, 92 Stat. 189). Individuals who attain age 65 prior to July 1, 1982 and all of whose job duties and responsibilities cease prior to that date will not be considered outside the exemption merely because their contract (or similar arrangement) providing for unlimited tenure expires on or after July 1, 1982.

(b) Since section 12(d) is an exemption from the nondiscrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakably met. Moreover, as with other exemptions from the ADEA, this exemption must be narrowly construed.

(c) Section 1201(a) of the Higher Education Act of 1965, as amended, and set forth in 20 U.S.C. 1141(a), provides in pertinent part:

> The term "institution of higher education" means an educational institution in any State which (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, (2) is legally authorized within such State to provide a program of education beyond secondary education, (3) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable for full credit toward such a degree, (4) is a public or other nonprofit institution, and (5) is accredited by a nationally recognized accrediting agency or association or, if not so accredited, (A) is an institution with respect to which the Commissioner has determined that there is satisfactory assurance, considering the resources available to the institution, the period of time, if any, during which it has operated, the effort it is making to meet accreditation standards, and the purpose for which this determination is being made, that the institution will meet the accreditation standards of such an agency or association within a reasonable time, or (B) is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited.

The definition encompasses almost all public and private universities and two and four year colleges. The omitted portion of the text of section 1201(a) refers largely on one-year technical schools which generally do not grant tenure to employees but which, if they do, are also eligible to claim the exemption.

(d)(1) Use of the term "any employee" indicates that application of the exemption is not limited to teachers, who are traditional recipients of tenure. The exemption may also be available with respect to other groups, such as academic deans, scientific researchers, professional librarians and counseling staff, who frequently have tenured status.

(2) The Conference Committee Report on the 1978 amendments expressly states that the exemption does not apply to Federal employees covered by section 15 of the Act (H.R. Rept. No. 95-950, p. 10).

(e)(1) The phrase "unlimited tenure" is not defined in the Act. However, the almost universally accepted definition of academic "tenure" is an arrangement under which certain appointments in an institution of higher education are continued until retirement for age of physical disability, subject to dismissal for adequate cause or under extraordinary circumstances on account of financial exigency or change of institutional program. Adopting that definition, it is evident that the word "unlimited" refers to the duration of tenure. Therefore, a contract (or other similar arrangement) which is limited to a specific term (for example, one year or 10 years) will not meet the requirements of the exemption.

(2) The legislative history shows that Congress intented the exemption to apply only where the minimum rights and privileges traditionally associated with tenure are guaranteed to an employee by contract or similar arrangement. While tenure policies and practices vary greatly from one institution to another, the minimum standards set forth in the 1940 Statement of Principles on Academic Freedom and Tenure, jointly developed by the Association of American Colleges and the American Association of University Professors, have enjoyed widespread adoption or endorsement. The 1940 Statement of Principles on academic tenure provides as follows:

> (a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.
>
> In the interpretation of this principle it is understood that the following represents acceptable academic practice:
>
> (1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.
>
> (2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of

> higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.
>
> (3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.
>
> (4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an advisor of his own choosing who may act as counsel.There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.
>
> (5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

(3) A contract or similar arrangement which meets the standards in the 1940 Statement of Principles will satisfy the tenure requirements of the exemption. However, a tenure arrangement will not be deemed inadequate solely because it fails to meet these standards in every respect. For example, a tenure plan will not be deemed inadequate solely because it includes a probationary period somewhat longer than seven years. Of course, the greater the deviation from the standards in the 1940 Statement of Principles, the less likely it is that the employee in question will be deemed subject to "unlimited tenure" within the meaning of the exemption. Whether or not a tenure arrangement is adequate to satisfy the requirements of the exemption must be determined on the basis of the facts of each case.

(f) Employees who are not assured of a continuing appointment either by contract of unlimited tenure or other similar arrangement (such as a state statute) would not, of course, be exempted from the prohibitions against compulsory retirement, even if they perform functions identical to those performed by employees with appropriate tenure.

(g) An employee within the exemption can lawfully be forced to retire on account of age at age 65 or above. In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status: *Provided*, That the employee voluntarily accepts this new position or status. For example, an employee who falls within the exemption may be offered a nontenured position or part-time employment. An employee who accepts a nontenured position or part-time employment, however, may not be treated any less favorably, on account of age, than any similarly situated younger employee (unless such less favorable treatment is excused by an exception to the Act).

[44 FR 66799, Nov. 21, 1979; 45 FR 43704, June 30, 1980; 45 FR 51547, Aug. 4, 1980]

§ 1625.12 Exemption for bona fide executive or high policymaking employees.

(a) Section 12(c)(1) of the Act, added by the 1978 amendments and as amended in 1984, provides: "Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee which equals, in the aggregate, at least $44,000."

(b) Since this provision is an exemption from the non-discrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakably met. Moreover, as with other exemptions from the Act, this exemption must be narrowly construed.

(c) An employee within the exemption can lawfully be forced to retire on account of age at age 65 or above. In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status. For example, an employee who falls within the exemption may be offered a position of lesser status or a part-time position. An employee who accepts such a new status or position, however, may not be treated any less favorably, on account of age, than any similarly situated younger employee.

(d)(1) In order for an employee to qualify as a "bona fide executive," the employer must initially show that the employee satisfies the definition of a bona fide executive set forth in § 541.1 of this chapter. Each of the requirements in paragraphs (a) through (e) of § 541.1 must be satisfied, regardless of the level of the employee's salary or compensation.

(2) Even if an employee qualifies as an executive under the definition in § 541.1 of this chapter, the exemption from the ADEA may not be claimed unless the employee also meets the further criteria specified in the Conference Committee Report in the form of examples (see H.R. Rept. No. 95-950, p. 9). The examples are intended to make clear that the exemption does not apply to middle-management employees, no matter how great their retirement income, but only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business. As stated in the Conference Report (H.R. Rept. No. 95-950, p. 9):

> Typically the head of a significant and substantial local or regional operation of a corporation [or other business organization], such as a major production facility or retail establishment, but not the head of a minor branch, warehouse or retail store, would be covered by the term "bona fide executive." Individuals at higher levels in the corporate organizational structure who possess comparable or greater levels of responsibility and authority as measured by established and recognized criteria would also be covered
>
> The heads of major departments or divisions of corporations [or other business organizations] are usually located at corporate or regional headquarters. With respect to employees whose duties are associated with corporate headquarters operations, such as finance, marketing, legal, production and manufacturing (or in a corporation organized on a product line basis, the management of product lines), the definition would cover employees who head those divisions.
>
> In a large organization the immediate subordinates of the heads of these divisions sometimes also exercise executive authority, within the meaning of this exemption. The conferees intend the definition to cover such employees if they possess responsibility which is comparable to or greater than that possessed by the head of a significant and substantial local operation who meets the definition.

(e) The phrase "high policymaking position," according to the Conference Report (H.R. Rept. No. 95-950, p. 10), is limited to "* * * certain top level employees who are not 'bona fide executives' * * *." Specifically, these are:

> * * * individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof.
>
> For example, the chief economist or the chief research scientist of a corporation typically has little line authority. His duties would be primarily intellectual as opposed to executive or managerial. His responsibility would be to evaluate significant economic or scientific trends and issues, to develop and recommend policy direction to the top executive officers of the corporation and he would have a significant impact on the ultimate decision on such policies by virtue of his expertise and direct access to the decisionmakers. Such an employee would meet the definition of a "high policymaking" employee.

On the other hand, as this description makes clear, the support personnel of a "high policymaking" employee would not be subject to the exemption even if they supervise the development, and draft the recommendation, of various policies submitted by their supervisors.

(f) In order for the exemption to apply to a particular employee, the employee must have been in a "bona fide executive or high policymaking position," as those terms are defined in this section, for the two-year period immediately before retirement. Thus, an employee who holds two or more different positions during the two-year period is subject to the exemption only if each such job is an executive or high policymaking position.

(g) The Conference Committee Report expressly states that the exemption is not applicable to Federal employees covered by section 15 of the Act (H.R. Rept. No. 95-950, p. 10).

(h) The "annual retirement benefit," to which covered employees must be entitled, is the sum of amounts payable during each one-year period from the date on which such benefits first become receivable by the retiree. Once established, the annual period upon which calculations are based may not be changed from year to year.

(i) The annual retirement benefit must be immediately available to the employee to be retired pursuant to the exemption. For purposes of determining compliance, "immediate" means that the payment of plan benefits (in a lump sum or the first of a series of periodic payments) must occur not later than 60 days after the effective date of the retirement in question. The fact that an employee will receive benefits only after expiration of the 60-day period will not preclude his retirement pursuant to the exemption, if the employee could have elected to receive benefits within that period.

(j)(1) The annual retirement benefit must equal, in the aggregate, at least $44,000. The manner of determining whether this requirement has been satisfied is set forth in §1627.17(c).

(2) In determining whether the aggregate annual retirement benefit equals at least $44,000, the only benefits which may be counted are those authorized by and provided under the terms of a pension, profit-sharing, savings, or deferred compensation plan. (Regulations issued pursuant to section 12(c)(2) of the Act, regarding the manner of calculating the amount of qualified retirement benefits for purposes of the exemption, are set forth in § 1627.17 of this chapter.)

(k)(1) The annual retirement benefit must be "nonforfeitable." Accordingly, the exemption may not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree or result in the reduction of benefits to less than $44,000 in any one year. For example, where a plan contains a provision under which benefits would be suspended if a retiree engages in litigation against the former employer, or obtains employment with a competitor of the former employer, the retirement benefit will be deemed to be forfeitable. However, retirement benefits will not be deemed forfeitable solely because the benefits are discontinued or suspended for reasons permitted under section 411(a)(3) of the Internal Revenue Code.

(2) An annual retirement benefit will not be deemed forfeitable merely because the minimum statutory benefit level is not guaranteed against the possibility of plan bankruptcy or is subject to benefit restrictions in the event of early termination of the plan in accordance with Treasury Regulation 1.401-4(c). However, as of the effective date of the retirement in question, there must be at least a reasonable expectation that the plan will meet its obligations.

(Sec. 12(c)(1) of the Age Discrimination In Employment Act of 1967, as amended by Sec. 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. 98-459, 98 Stat. 1792))

[44 FR 66800, Nov. 21, 1979; 45 FR 43704, June 30, 1980, as amended at 50 FR 2544, Jan. 17, 1985]

§ 1625.13 Apprenticeship programs.

Age limitations for entry into bona fide apprenticeship programs were not intended to be affected by the Act. Entry into most apprenticeship programs has traditionally been limited to youths under specified ages. This is in recognition of the fact that apprenticeship is an extension of the educational process to prepare young men and women for skilled employment. Accordingly, the prohibitions contained in the Act will not be applied to bona fide apprenticeship programs which meet the standards specified in §§ 521.2 and 521.3 of this chapter.

Subpart B—Substantive Regulations

§ 1625.20 Employer obligations under Section 4(g) of the Act.

(a) *Employee Coverage under Section 4(g) of the Act.* (1) Employees aged 65 through 69, including disabled employees, shall be entitled to coverage under any group health plan(s) offered to employees under age 65 under the same terms and conditions. The standard of compliance with this requirement shall be one of benefit equivalence.

(2) Any employees encompassed by paragraph (a)(1) of this section shall be entitled to spousal coverage under any group health plan offered to such employees under the same terms and conditions as any employee under age 65. The standard of compliance with this requirement shall be one of equality of treatment with similarly situated younger employees. In the event that the employer's plan does not provide for spousal coverage the employer need not do so for employees aged 65 through 69.

(3) Employees aged 65 through 69 are covered by the requirements of Section 4(g) of the Act from the month in which they attain age 65 through the day on which they attain age 70.

(4) Retirees are not covered by the provisions of Section 4(g) of the Act.

(b) *Employer coverage under Section 4(g) of the Act.* (1) Any employers who meet the standards for coverage set forth in Section 11(b) of the Act are subject to the requirements of Section 4(g) of the Act and the regulations of this part. As to persons other than employers subject to the Act, the provisions of 29 CFR 860.120 shall continue to apply.

(2) Any employer meeting the standards for coverage set forth in paragraph (b)(1) of this section who provides health insurance coverage to its employees either in cooperation with a labor organization or indirectly through an agent of the employer is covered by the provisions of Section 4(g) of the Act.

(c) *Election of primary health care coverage.* (1) Each employee aged 65 through 69 must be offered the opportunity to elect in writing coverage under any group health plan offered by its employer. Every employer must communicate to each eligible employee in writing prior to the time of election in specific terms and conditions of all available health insurance plans. Every employer must notify each eligible employee that if the employer's plan(s) covers any of the same items and services covered by Medicare, the employer plan(s) is primary for those services and Medicare pays secondary benefits. Every employer must inform all eligible employees of the consequences of choosing any employer health plan and the extent to which benefits available under an employer plan can be anticipated to be supplemented by Medicare coverage. Similarly, eligible employees must be informed of the consequences of not choosing an employer plan(s). Every employer must also inform eligible employees that if the employer's plan(s) covers only non-Medicare covered items and services, such as dental care and prescription drugs, the employer plan(s) is liable for those non-Medicare covered items and services and Medicare is liable for Medicare-covered items and services such as hospitalization. Every employer should attempt to inform each eligible employee of the need to apply for Medicare coverage. Where the employer previously paid or contributed toward the Medicare Part B premium payment, the employer must notify each eligible employee if and under what circumstances it intends to discontinue Medicare Part B contributions. Such a notice should specifically inform each eligible employee of the penalty resulting from a lapse in Medicare Part B coverage.

(i) The election described in paragraph (c)(1) of this section above must be offered to all eligible employees and implemented within 90 days following the date of publication of these regulations.

(ii) An employer's existing health plan coverage must continue in effect until an election is made and implemented or until an earlier date as requested by the employee.

(iii) Employees aged 65 through 69 who were not eligible by reason of age for the election described in paragraph (c)(1) of this section at the time it was offered must be informed of the options specified in paragraph (c)(1) of this section at least 30 days prior to their first day of eligibility.

(iv) Employees aged 65 through 69 must be afforded the same opportunities to change their primary health insurance coverage as are offered to younger employees.

(d) *Employer contributions.* Contributory Plans. An employer must offer to all employees aged 65 through 69, at no additional cost, the same plan or plans that are offered to younger employees.

(e) *Group Health Care Plans Designed to Supplement Medicare.* (1) An employer may no longer offer to an employee aged 65 through 69 a group health plan whose terms make it a secondary payor to Medicare for services covered under either Medicare Part A or Medicare Part B.

(2) An employer who offers to its employees a health benefits plan covering only non-Medicare covered items and services shall offer such a plan to all employees through age 69 on an equal basis.

(3) An employer may not offer inducements to employees age 65 through 69 to elect not to be covered by an employer plan.

(f) *Construction.* (1) The Commission will strictly enforce the provisions of these rules to ensure that no employee aged 65 through 69 suffers a discriminatory reduction in health care benefits as a result of the enactment of Section 4(g) of the Act.

(2) Violations of these rules will be deemed willful and will subject an employer to liquidated damages as provided by the provisions of Section 7(b) of the ADEA.

(3) Health care benefits provided under this section may not be included by an employer under a "benefit package" approach.

(4) An employer is prohibited from making benefit reductions in violation of section 4(a)(3) of the ADEA. Signed at Washington, D.C. this 24th day of May, 1983.

[48 FR 26437, June 7, 1983]

PART 1626—PROCEDURES—AGE DISCRIMINATION IN EMPLOYMENT ACT

Sec.

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AUTHORITY: Sec. 9, 81 Stat. 605, 29 U.S.C. 628; Sec. 2, Reorg. Plan No. 1 of 1978, 3 CFR 321 (1979).

SOURCE: 48 FR 140, Jan. 3, 1983, unless otherwise noted.

§ 1626.1 Purpose.

The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of the Age Discrimination in Employment Act of 1967, as amended.

§ 1626.2 Terms defined in the Age Discrimination in Employment Act of 1967, as amended.

The terms "person," "employer," "employment agency," "labor organization," "employee," "commerce," "industry affecting commerce," and

"State" as used herein shall have the meanings set forth in section 11 of the Age Discrimination in Employment Act, as amended.

§ 1626.3 Other definitions.

For purpose of this part, the term "the Act" shall mean the Age Discrimination in Employment Act of 1967, as amended; the "Commission" shall mean the Equal Employment Opportunity Commission or any of its designated representatives; "charge" shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act; "complaint" shall mean information received from any source, that is not a charge, which alleges that a named prospective defendant has engaged in or is about to engage in actions in violation of the Act; "charging party" means the person filing a charge; "complainant" means the person filing a complaint; and "respondent" means the person named as a prospective defendant in a charge or complaint, or as a result of a Commission-initiated investigation.

§ 1626.4 Information concerning alleged violations of the Act.

The Commission may, on its own initiative, conduct investigations of employers, employment agencies and labor organizations, in accordance with the powers vested in it pursuant to sections 6 and 7 of the Act. The Commission shall also receive information concerning alleged violations of the Act, including charges and complaints, from any source. Where the information discloses a possible violation, the appropriate Commission office may render assistance in the filing of a charge. The identity of a complainant, confidential witness, or aggrieved person on whose behalf a charge was filed will ordinarily not be disclosed without prior written consent, unless necessary in a court proceeding.

§ 1626.5 Where to submit complaints and charges.

Complaints and charges may be submitted in person, by telephone, or by mail to any of the District, Area or local Offices of the Commission, or at the Headquarters of the Commission at Washington, D.C., or with any designated representative of the Commission. The addresses of the Commission's District, Area and Local Offices appear at § 1610.4.

[48 FR 140, Jan. 3, 1983, as amended at 49 FR 13025, Apr. 2, 1984]

§ 1626.6 Form of charge.

A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing.

§ 1626.7 Timeliness of charge.

(a) Charges will not be rejected as untimely provided that they are not barred by the statute of limitations as stated in section 6 of the Portal to Portal Act of 1947.

(b) Potential charging parties will be advised that, pursuant to section 7(d) (1) and (2) of the Act, no civil suit may be commenced by an individual until 60 days after a charge has been filed on the subject matter of the suit, and such charge shall be filed with the Commission or its designated agent within 180 days of the alleged discriminatory action, or, in a case where the alleged discriminatory action occurs in a state which has its own age discrimination law and authority administering that law, within 300 days of the alleged discriminatory action, or 30 days after receipt of notice of termination of State proceedings, whichever is earlier.

(c) For purposes of determining the date of filing with the Commission, the following applies:

(1) Charges filed by mail: (i) Date of postmark, if legible, (ii) Date of letter, if postmark is illegible, (iii) Date of receipt by Commission, or its designated agent, if postmark and letter date are illegible and/or cannot be accurately affixed;

(2) Written charges filed in person: Date of receipt;

(3) Oral charges filed in person or by telephone, as reduced to writing: Date of oral communication received by Commission.

§ 1626.8 Contents of charge; amendment of charge.

(a) In addition to the requirements of § 1626.6, each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge;

(2) The full name and address of the person against whom the charge is made;

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;

(4) If known, the approximate number of employees of the prospective defendant employer or members of the prospective defendant labor organization.

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of § 1626.6.

(c) A charge may be amended to clarify or amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not again be referred to the appropriate State agency.

§ 1626.9 Referral to and from State agencies; referral States.

(a) The Commission may refer all charges to any appropriate State agency and will encourage State agencies to refer charges to the Commission in order to assure that the prerequisites for private law suits, as set out in section 14(b) of the Act, are met. Charges so referred shall be deemed to have been filed with the Commission in accordance with the specifications contained in § 1626.7(b). The Commission may process any charge at any time, notwithstanding provisions for referral to and from appropriate State agencies.

(b) States to which all ADEA charges may be referred: Alaska, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Puerto Rico, South Carolina, Utah, Virgin Islands, West Virginia, and Wisconsin.

(c) States to which only specified classes of charges are referred: Arizona, Colorado, Kansas, Maine, Ohio, Rhode Island, South Dakota, and Washington.

§ 1626.10 Agreements with State or local fair employment practices agencies.

(a) Pursuant to sections 6 and 7 of the ADEA and section 11(b) of the FLSA, the Commission may enter into agreements with state or local fair employment practices agencies to cooperate in enforcement, technical assistance, research, or public informational activities, and may engage the services of such agencies in processing charges assuring the safeguard of the federal rights of aggrieved persons.

(b) The Commission may enter into agreements with state or local agencies which authorize such agencies to receive charges and complaints pursuant to § 1626.5 and in accordance with the specifications contained in §§ 1626.7 and 1626.8.

(c) When a worksharing agreement with a State agency is in effect, the State agency will act on certain charges and the Commission will promptly process charges which the State agency does not pursue. Charges received by one agency under the agreement shall be deemed received by the other agency for purposes of § 1626.7

§ 1626.11 Notice of charge.

Upon receipt of a charge, the Commission shall promptly notify the respondent that a charge has been filed.

§ 1626.12 Conciliation efforts pursuant to section 7(d) of the Act.

Upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion. Upon failure of such conciliation the Commission will notify the charging party. Such notification enables the charging party or any person aggrieved by the subject matter of the charge to commence action to enforce their rights without waiting for the lapse of 60 days.

§ 1626.13 Withdrawal of charge.

Charging parties may request withdrawal of a charge. Because the Commission has independent investigative authority, see § 1626.4, it may continue any investigation and may secure relief for all affected persons notwithstanding a request by a charging party to withdraw a charge.

§ 1626.14 Right to inspect or copy data.

A person who submits data or evidence to the Commission may retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that a witness may for good cause be limited to inspection of the official transcript of his or her testimony.

§ 1626.15 Commission enforcement.

(a) As provided in Sections 9, 11, 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209, 211, 216 and 217) (FLSA) and Sections 6 and 7 of this Act, the Commission and its authorized representatives may (1) investigate and gather data; (2) enter and inspect establishments and records and make transcripts thereof; (3) interview employees; (4) impose on persons subject to the Act appropriate recordkeeping and reporting requirements; (5) advise employers, employment agencies and labor organizations with regard to their obligations under the Act and any changes necessary in their policies, practices and procedures to assure compliance with the Act; (6) subpoena witnesses and require the production of documents and other evidence; (7) supervise the payment of amounts owing pursuant to section 16(c) of the FLSA, and (8) institute action under section 16(c) or section 17 of the FLSA or both to obtain appropriate relief.

(b) Whenever the Commission has a reasonable basis to conclude that a violation of the Act has occurred or will occur, it may commence conciliation under section 7(b) of the Act. The date of issuance of written notice to the respondent of the Commission's intent to begin or continue conciliation shall determine when the statute of limitations is tolled pursuant to section 7(e)(2) of the Act. Such notice will ordinarily be issued in the form of a letter of violation; provided, however, that failure to issue a written violation letter shall in no instance be construed as a finding of no violation. The Commission will ordinarily notify the respondent and aggrieved persons of its determination. In the process of conducting any investigation or conciliation under this Act, the identity of persons who have provided information in confidence shall not be disclosed except in accordance with § 1626.4. When the written notice prescribed above is issued, the statute of limitations shall be tolled for a period of one year unless a conciliation agreement is obtained earlier.

(c) Any agreement reached as a result of efforts undertaken pursuant to this section shall, as far as practicable, require the respondent to eliminate the unlawful practice(s) and provide appropriate affirmative relief. Such agreement shall be reduced to writing and will ordinarily be signed by the Commission's delegated representative, the respondent, and the charging party, if any. A copy of the signed agreement shall be sent to all the signatories thereto.

(d) Upon the failure of informal conciliation, conference and persuasion under section 7(b) of the Act, the Commission may initiate and conduct litigation.

(e) The District Directors and the Director of the Office of Program Operations or their designees, are hereby delegated authority to exercise the powers enumerated in § 1626.15(a) (1) through (7) and (b) and (c). The General Counsel or his/her designee is hereby delegated the authority to exercise the powers in paragraph (a) of this section and at the direction of the Commission to initiate and conduct litigation.

§ 1626.16 Subpoenas.

(a) To effectuate the purposes of the Act the Commission shall have the authority to issue a subpoena requiring:

(1) The attendance and testimony of witnesses;

(2) The production of evidence including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpoenaed; and

(3) Access to evidence for the purpose of examination and the right to copy.

(b) The power to issue subpoenas has been delegated by the Commission, pursuant to section 6(a) of the Act, to the General Counsel, the District Directors, the Director of the Office of Program Operations, or their designees. The subpoena shall state the name, address and title of the issuer, identify the person or evidence subpoenaed, the name of the person to whom the subpoena is returnable, the date, time and place that testimony is to be given or that documents are to be provided or access provided.

(c) A subpoena issued by the Commission or its designee pursuant to the Act is not subject to review or appeal.

(d) Upon the failure of any person to comply with a subpoena issued under this section, the Commission may utilize the provisions of sections 9 and 10 of the Federal Trade Commission Act, 15 U.S.C. 49 and 50, to compel compliance with the subpoena.

(e) Persons subpoenaed shall be entitled to the same fees and mileage that are paid witnesses in the courts of the United States.

§ 1626.17 Procedure for requesting an opinion letter.

(a) A request for an opinion letter should be submitted in writing to the Chairman, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506, and shall contain:

(1) A concise statement of the issues on which an opinion is requested;

(2) As full a statement as possible of relevant facts and law; and

(3) The names and addresses of the person making the request and other interested persons.

(b) Issuance of an opinion letter by the Commission is discretionary.

(c) Informal Advice: When the Commission, at its discretion, determines that it will not issue an opinion letter as defined in § 1626.18, the Commission may provide informal advice or guidance to the requestor. An informal letter of advice does not represent the formal position of the Commission and does not commit the Commission to the views expressed therein. Any letter other than those defined in § 1626.18(a)(1) will be considered a letter of advice and may not be relied upon by any employer within the meaning of section 10 of the Portal to Portal Act of 1947, incorporated into the Age Discrimination in Employment Act of 1967 through section 7(e)(1) of the Act.

§ 1626.18 Effect of opinions and interpretations of the Commission.

(a) Section 10 of the Portal to Portal Act of 1947, incorporated into the Age Discrimination in Employment Act of 1967 through section 7(e)(1) of the Act, provides that:

> In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulations, order, ruling, approval or interpretation . . . or any administrative practice or enforcement policy of [the Commission].

The Commission has determined that only (1) a written document, entitled "opinion letter," signed by the Legal Counsel on behalf of and as approved by the Commission, or (2) a written document issued in the conduct of litigation, entitled "opinion letter," signed by the General Counsel on behalf of and as approved by the Commission, or (3) matter published and specifically designated as such in the FEDERAL REGISTER, may be relied upon by any employer as a "written regulation, order, ruling, approval or interpretation" or "evidence of any administrative practice or enforcement policy" of the Commission "with respect to the class of employers to which he belongs," within the meaning of the statutory provisions quoted above.

(b) An opinion letter issued pursuant to § 1626.18 (a)(1) above, when issued to the specific addressee, has no effect upon situations other than that of the specific addressee.

(c) When an opinion letter, as defined in § 1626.18 (a)(1), is requested, the procedure stated in § 1626.17 shall be followed.

§ 1626.19 Rules to be liberally construed.

(a) These rules and regulations shall be liberally construed to effectuate the purposes and provisions of this Act and any other acts administered by the Commission.

(b) Whenever the Commission receives a charge or obtains information relating to possible violations of one of the statutes which it administers and the charge or information reveals possible violations of one or more of the other statutes which it administers, the Commission will treat such charges or information in accordance with all such relevant statutes.

(c) Whenever a charge is filed under one statute and it is subsequently believed that the alleged discrimination constitutes an unlawful employment practice under another statute administered and enforced by the Commission, the charge may be so amended and timeliness determined from the date of filing of the original charge.

PART 1627—RECORDS TO BE MADE OR KEPT RELATING TO AGE: NOTICES TO BE POSTED: ADMINISTRATIVE EXEMPTIONS

Subpart A—General

Sec.

1627.1 Purpose and scope.

Subpart B—Records to be Made or Kept Relating to Age; Notices To Be Posted

1627.2 Forms of records.
1627.3 Records to be kept by employers.
1627.4 Records to be kept by employment agencies.
1627.5 Records to be kept by labor organizations.
1627.6 Availability of records for inspection.
1627.7 Transcription and reports.
1627.8-1627.9 [Reserved]
1627.10 Notices to be posted.
1627.11 Petitions for recordkeeping exceptions.

Subpart C—Administrative Exemptions

1627.15 Administrative exemptions; procedures.
1627.16 Specific exemptions.

Subpart D—Statutory Exemption

1627.17 Calculating the amount of qualified retirement benefits for purposes of the exemption for bona fide executives or high policymaking employees.

AUTHORITY: Sec. 7, 81 Stat. 604; 29 U.S.C. 626; sec. 11, 52 Stat. 1066, as amended, 29 U.S.C. 211; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

SOURCE: 44 FR 38459, July 2, 1979, unless otherwise noted.

Subpart A—General

§ 1627.1 Purpose and scope.

(a) Section 7 of the Age Discrimination in Employment Act of 1967 (hereinafter referred to in this part as the Act) empowers the Commission to require the keeping of records which are necessary or appropriate for the administration of the Act in accordance with the powers contained in section 11 of the Fair Labor Standards Act of 1938. Subpart B of this part sets forth the recordkeeping and posting requirements which are prescribed by the Commission for employers, employment agencies, and labor organizations which are subject to the Act. Reference should be made to section 11 of the Act for definitions of the terms "employer", "employment agency", and "labor organization". General interpretations of the Act and of this part are published in Part 1625 of this chapter. This part also reflects pertinent delegations of the Commission's duties.

(b) Subpart C of this part sets forth the Commission's rules under section 9 of the Act providing that the Commission may establish reasonable exemptions to and from any or all provisions of the Act as it may find necessary and proper in the public interest.

(c) Subpart D of this part sets forth the Commission's regulations issued pursuant to section 12(c)(2) of the Act, providing that the Secretary of Labor, after consultation with the Secretary of the Treasury, shall prescribe the manner of calculating the amount of qualified retirement benefits for purposes of the exemption in section 12(c)(1) of the Act.

[44 FR 38459, July 2, 1979, as amended at 44 FR 66797, Nov. 21, 1979]

Subpart B—Records To Be Made or Kept Relating to Age; Notices To Be Posted

§ 1627.2 Forms of records.

No particular order or form of records is required by the regulations in this Part 1627. It is required only that the records contain in some form the information specified. If the information required is available in records kept for other purposes, or can be obtained readily by recomputing or extending data recorded in some other form, no further records are required to be made or kept on a routine basis by this Part 1627.

§ 1627.3 Records to be kept by employers.

(a) Every employer shall make and keep for 3 years payroll or other records for each of his employees which contain:

(1) Name;

(2) Address;

(3) Date of birth;

(4) Occupation;

(5) Rate of pay, and

(6) Compensation earned each week.

(b)(1) Every employer who, in the regular course of his business, makes, obtains, or uses, any personnel or employment records related to the following, shall, except as provided in paragraphs (b) (3) and (4) of this section, keep them for a period of 1 year from the date of the personnel action to which any records relate:

(i) Job applications, resumes, or any other form of employment inquiry whenever submitted to the employer in response to his advertisement or other notice of existing or anticipated job openings, including records pertaining to the failure or refusal to hire any individual,

(ii) Promotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee,

(iii) Job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings,

(iv) Test papers completed by applicants or candidates for any position which disclose the results of any employer-administered aptitude or other employment test considered by the employer in connection with any personnel action,

(v) The results of any physical examination where such examination is considered by the employer in connection with any personnel action,

(vi) Any advertisements or notices to the public or to employees relating to job openings, promotions, training programs, or opportunities for overtime work.

(2) Every employer shall keep on file any employee benefit plans such as pension and insurance plans, as well as copies of any seniority systems and merit systems which are in writing, for the full period the plan or system is in effect, and for at least 1 year after its termination. If the plan or system is not in writing, a memorandum fully outlining the terms of such plan or system and the manner in which it has been communicated to the affected employees, together with notations relating to any changes or revisions thereto, shall be kept on file for a like period.

(3) In the case of application forms and other preemployment records of applicants for positions which are, and are known by applicants to be, of a temporary nature every record required to be kept under paragraph (b)(1) of this section shall be kept for a period of 90 days from the date of the personnel action to which the record relates.

(4) When an enforcement action is commenced under section 7 of the Act regarding a particular applicant or employee, the Commission or its authorized representative may require the employer to retain any record required to be kept under paragraph (b) (1), (2), or (3) of this section which is relative to such action until the final disposition thereof.

(Approved by the Office of Management and Budget under control number 3046-0018)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[44 FR 38459, July 2, 1979, as amended at 46 FR 63268, Dec. 31, 1981]

§ 1627.4 Records to be kept by employment agencies.

(a)(1) Every employment agency which, in the regular course of its business, makes, obtains, or uses, any records related to the following, shall, except as provided in paragraphs (a) (2) and (3) of this section, keep them for a period of 1 year from the date of the action to which the records relate:

(i) Placements;

(ii) Referrals, where an individual is referred to an employer for a known or reasonably anticipated job opening;

(iii) Job orders from employers seeking individuals for job openings;

(iv) Job applications, resumes, or any other form of employment inquiry or record of any individual which identifies his qualifications for employment, whether for a known job opening at the time of submission or for future referral to an employer;

(v) Test papers completed by applicants or candidates for any position which disclose the results of any agency-administered aptitude or other employment test considered by the agency in connection with any referrals;

(vi) Advertisements or notices relative to job openings.

(2) In the case of application forms and other preemployment records of applicants for positions which are, and are known by applicants to be, of a temporary nature, every record required to be kept under paragraph (a)(1) of this section shall be kept for a period of 90 days from the date of the making or obtaining of the record involved.

(3) When an enforcement action is commenced under section 7 of the Act regarding a particular applicant, the Commission or its authorized representative may require the employment agency to retain any record required to be kept under paragraph (a) (1) or (2) of this section which is relative to such action until the final disposition thereof.

(b) Whenever an employment agency has an obligation as an "employer" or a "labor organization" under the Act, the employment agency must also comply with the recordkeeping requirements set forth in § 1627.3 or § 1627.5, as appropriate.

(Approved by the Office of Management and Budget under control number 3046-0018)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[44 FR 38459, July 2, 1979, as amended at 46 FR 63268, Dec. 31, 1981]

§ 1627.5 Records to be kept by labor organizations.

(a) Every labor organization shall keep current records identifying its members by name, address, and date of birth.

(b) Every labor organization shall, except as provided in paragraph (c) of this section, keep for a period of 1 year from the making thereof, a record of the name, address, and age of any individual seeking membership in the organization. An individual seeking membership is considered to be a person who files an application for membership or who, in some other manner, indicates a specific intention to be considered for membership, but does not include any individual who is serving for a stated limited probationary period prior to permanent employment and formal union membership. A person who merely makes an inquiry about the labor organization or, for example, about its general program, is not considered to be an individual seeking membership in a labor organization.

(c) When an enforcement action is commenced under section 7 of the Act regarding a labor organization, the Commission or its authorized representative may require the labor organization to retain any record required to be kept under paragraph (b) of this section which is relative to such action until the final disposition thereof.

(d) Whenever a labor organization has an obligation as an "employer" or as an "employment agency" under the Act, the labor organization must also comply with the recordkeeping requirements set forth in § 1627.3 or § 1627.4, as appropriate.

(Approved by the Office of Management and Budget under control number 3046-0018)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[44 FR 38459, July 2, 1979, as amended at 46 FR 63268, Dec. 31, 1981]

§ 1627.6 Availability of records for inspection.

(a) *Place records are to be kept.* The records required to be kept by this part shall be kept safe and accessible at the place of employment or business at which the individual to whom they relate is employed or has applied for employment or membership, or at one or more established central recordkeeping offices.

(b) *Inspection of records.* All records required by this part to be kept shall be made available for inspection and transcription by authorized representatives of the Commission during business hours generally observed by the office at which they are kept or in the community generally. Where records are maintained at a central recordkeeping office pursuant to paragraph (a) of this section, such records shall be made available at the office at which they would otherwise be required to be kept within 72 hours following request from the Commission or its authorized representative.

(Approved by the Office of Management and Budget under control number 3046-0018)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[44 FR 38459, July 2, 1979, as amended at 46 FR 63268, Dec. 31, 1981]

§ 1627.7 Transcriptions and reports.

Every person required to maintain records under the Act shall make such extension, recomputation or transcriptions of his records and shall submit such reports concerning actions taken and limitations and classifications of individuals set forth in records as the Commission or its authorized representative may request in writing.

(Approved by the Office of Management and Budget under control number 3046-0018)

(Pub. L. No. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[44 FR 38459, July 2, 1979, as amended at 46 FR 63268, Dec. 31, 1981]

§§ 1627.8–1627.9 [Reserved]

§ 1627.10 Notices to be posted.

Every employer, employment agency, and labor organization which has an obligation under the Age Discrimination in Employment Act of 1967 shall post and keep posted in conspicuous places upon its premises the notice pertaining to the applicability of the Act prescribed by the Commission or its authorized representative. Such a notice must be posted in prominent and accessible places where it can readily be observed by employees, applicants for employment and union members.

§ 1627.11 Petitions for recordkeeping exceptions.

(a) *Submission of petitions for relief.* Each employer, employment agency, or labor organization who for good cause wishes to maintain records in a manner other than required in this part, or to be relieved of preserving certain records for the period or periods prescribed in this part, may submit in writing a petition to the Commission requesting such relief setting forth the reasons therefor and proposing alternative recordkeeping or record-retention procedures.

(b) *Action on petitions.* If, no review of the petition and after completion of any necessary or appropriate investigation supplementary thereto, the Commission shall find that the alternative procedure proposed, if granted, will not hamper or interfere with the enforcement of the Act, and will be of equivalent usefulness in its enforcement, the Commission may grant the petition subject to such conditions as it may determine appropriate and subject to revocation. Whenever any relief granted to any person is sought to be revoked for failure to comply with the conditions of the Commission, that person shall be notified in writing of the facts constituting such failure and afforded an opportunity to achieve or demonstrate compliance.

(c) *Compliance after submission of petitions.* The submission of a petition or any delay of the Commission in acting upon such petition shall not relieve any employer, employment agency, or labor organization from any obligations to comply with this part. However, the Commission shall give notice of the denial of any petition with due promptness.

Subpart C—Administrative Exemptions

§ 1627.15 Administrative exemptions; procedures.

(a) Section 9 of the Act provides that, "In accordance with the provisions of subchapter II of chapter 5, of title 5, United States Code, the Secretary of Labor * * * may establish such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest."

(b) The authority conferred on the Commission by section 9 of the Act to establish reasonable exemptions will be exercised with caution and due regard for the remedial purpose of the statute to promote employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination in employment. Administrative action consistent with this statutory purpose may be taken under this section, with or without a request therefor, when found necessary and proper in the public interest in accordance with the statutory standards. No formal procedures have been prescribed for requesting such action. However, a reasonable exemption from the Act's provisions will be granted only if it is decided, after notice published in the FEDERAL REGISTER giving all interested persons an opportunity to present data, views, or arguments, that a strong and affirmative showing has been made that such exemption is in fact necessary and proper in the public interest. Request for such exemption shall be submitted in writing to the Commission.

§ 1627.16 Specific exemptions.

(a) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in § 1627.15(b) of this part, it has been found necessary and proper in the public interest to exempt from all prohibitions of the Act all activities and programs under Federal contracts or grants, or carried out by the public employment services of the several States, designed exclusively to provide employment for, or to encourage the employment of, persons with special employment problems, including employment activities and programs under the Manpower Development and Training Act of 1962, as amended, and the Economic Opportunity Act of 1964, as amended, for persons among the long-term unemployed, handicapped, members of minority groups, older workers, or youth. Questions concerning the application of this exemption shall be referred to the Commission for decision.

(b) Any employer, employment agency, or labor organization the activities of which are exempt from the prohibitions of the Act under paragraph (a) of this section shall maintain and preserve records containing the same information and data that is required of employers, employment agencies, and labor organizations under §§ 1627.3, 1627.4, and 1627.5, respectively.

Subpart D—Statutory Exemption

§ 1627.17 Calculating the amount of qualified retirement benefits for purposes of the exemption for bona fide executives or high policymaking employees.

(a) Section 12(c)(1) of the Act, added by the 1978 amendments and amended in 1984, provides: "Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000." The Commission's interpretative statements regarding this exemption are set forth in §1625 of this chapter.

(b) Section 12(c)(2) of the Act provides:

> In applying the retirement benefit test of paragraph (a) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(c)(1) The requirement that an employee be entitled to the equivalent of a $44,000 straight life annuity (with no ancillary benefits) is statisfied in any case where the employee has the option of receiving, during each year of his or her lifetime following retirement, an annual payment of at least $44,000, or periodic payments on a more frequent basis which, in the aggregate, equal at least $44,000 per year: Provided, however, that the portion of the retirement income figure attributable to Social Security, employee contributions, rollover contributions and contributions of prior employers is excluded in the manner described in paragraph (e) of this section. (A retirement benefit which excludes these amounts is sometimes referred to herein as a "qualified" retirement benefit.)

(2) The requirment is also met where the employee has the option of receiving, upon retirement, a lump sum payment with which it is possible to purchase a single life annuity (with no ancillary benefits) yielding at least $44,000 per year as adjusted.

(3) The requirement is also satisfied where the employee is entitled to receive, upon retirement, benefits whose aggregate value, as of the date of the employee's retirement, with respect to those payments which are scheduled to be made within the period of life expectancy of the employee, is $44,000 per year as adjusted.

(4) Where an employee has one or more of the options described in paragraphs (c)(1) through (3) of this section, but instead selects another option (or options), the test is also met. On the other hand, where an employee has no choice but to have certain benefits provided after his or her death, the value of these benefits may not be included in this determination.

(5) The determination of the value of those benefits which may be counted towards the $44,000 requirement must be made on the basis of reasonable actuarial assumptions with respect to mortality and interest. For purposes of excluding from this determination any benefits which are available only after death, it is not necessary to determine the life expectancy of each person on an individual basis. A reasonable actuarial assumption with respect to mortality will suffice.

(6) The benefits computed under paragraphs (c)(1), (2) and (3) of this section shall be aggregated for purposes of determining whether the $44,000 requirement has been met.

(d) The only retirement benefits which may be counted towards the $44,000 annual benefit are those from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans. Such plans include, but are not limited to, stock bonus, thrift and simplified employee pensions. The value of benefits from any other employee benefit plans, such as health or life insurance, may not be counted.

(e) In calculating the value of a pension, profit-sharing, savings, or deferred compensation plan (or any combination of such plans), amounts attributable to Social Security, employee contributions, contributions of prior employers, and rollover contributions must be excluded. Specific rules are set forth below.

(1) *Social Security.* Amounts attributable to Social Security must be excluded. Since these amounts are readily determinable, no specific rules are deemed necessary.

(2) *Employee contributions.* Amounts attributable to employee contributions must be excluded. The regulations governing this requirement are based on section 411(c) of the Internal Revenue Code and Treasury Regulations thereunder (§ 1.411(c)-(1)), relating to the allocation of accrued benefits between employer and employee contributions. Different calculations are needed to determine the amount of employee contributions, depending upon whether the retirement income plan is a defined contribution plan or a defined benefit plan. Defined contribution plans (also referred to as individual account plans) generally provide that each participant has an individual account and the participant's benefits are based solely on the account balance. No set benefit is promised in defined contribution plans, and the final amount is a result not only of the actual contributions, but also of other factors, such as investment gains and losses. Any retirement income plan which is not an individual account plan is a defined benefit plan. Defined benefit plans generally provide a definitely determinable benefit, by specifying either a flat monthly payment or a schedule of payments based on a formula (frequently involving salary and years of service), and they are funded according to actuarial principles over the employee's period of participation.

(i) *Defined contribution plans*—(A) *Separate accounts maintained.* If a separate account is maintained with respect to an employee's contributions and all income, expenses, gains and losses attributable thereto, the balance in such an account represents the amount attributable to employee contributions.

(B) *Separate accounts not maintained.* If a separate account is not maintained with respect to an employee's contributions and the income, expenses, gains and losses attributable thereto, the proportion of the total benefit attributable to employee contributions is determined by multiplying that benefit by a fraction:

(*1*) The numerator of which is the total amount of the employee's contributions under the plan (less withdrawals), and

(*2*) The denominator of which is the sum of the numerator and the total contributions made under the plan by the employer on behalf of the employee (less withdrawals).

Example: A defined contribution plan does not maintain separate accounts for employee contributions. An employee's annual retirement benefit under the plan is $40,000. The employee has contributed $96,000 and the employer has contributed $144,000 to the employee's individual account; no withdrawals have been made. The amount of the $40,000 annual benefit attributable to employee contributions is $40,000 × $96,000/ $96,000 + $144,000 = $16,000. Hence the employer's share of the $40,000 annual retirement benefit is $40,000 minus $16,000 or $24,000—too low to fall within the exemption.

(ii) *Defined benefit plans*—(A) *Separate accounts maintained.* If a separate account is maintained with respect to an employee's contributions and all income, expenses, gains and losses attributable thereto, the balance in such an account represents the amount attributable to employee contributions.

(B) *Separate accounts not maintained.* If a separate account is not maintained with respect to an employee's contributions and the income, expenses, gains and losses attributable thereto, all of the contributions made by an employee must be converted actuarially to a single life annuity (without ancillary benefits) commencing at the age of forced retirement. An employee's accumulated contributions are the sum of all contributions (mandatory and, if not separately accounted for, voluntary) made by the employee, together with interest on the sum of all such contributions compounded annually at the rate of 5 percent per annum from the time each such contribution was made until the date of retirement. *Provided, however,* That prior to the date any plan became subject to section 411(c) of the Internal Revenue Code, interest will be credited at the rate (if any) specified in the plan. The amount of the employee's accumulated contribution described in the previous sentence must be multiplied by an "appropriate conversion factor" in order to convert it to a single life annuity (without ancillary benefits) commencing at the age of actual retirement. The appropriate conversion factor depends upon the age of retirement. In accordance with Rev. Rul. 76-47, 1976-2 C.B. 109, the following conversion factors shall be used with respect to the specified retirement ages:

Retirement age	Conversion factor percent
65 through 66	10
67 through 68	11
69	12

Example: An employee is scheduled to receive a pension from a defined benefit plan of $50,000 per year. Over the years he has contributed $150,000 to the plan, and at age 65 this amount, when contributions have been compounded at appropriate annual interest rates, is equal to $240,000. In accordance with Rev. Rul. 76-47, 10 percent is an appropriate conversion factor. When the $240,000 is multiplied by this conversion factor, the product is $24,000, which represents that part of the $50,000 annual pension payment which is attributable to employee contributions. The difference—$26,000—represents the employer's contribution, which is too low to meet the test in the exemption.

(3) *Contributions of prior employers.* Amounts attributable to contributions of prior employers must be excluded.

(i) *Current employer distinguished from prior employers.* Under the section 12(c) exemption, for purposes of excluding contributions of prior employers, a prior employer is every previous employer of the employee except those previous employers which are members of a "controlled group of corporations" with, or "under common control" with, the employer which forces the employee to retire, as those terms are used in sections 414 (b) and 414(c) of the Internal Revenue Code, as modified by section 414(h) (26 U.S.C. 414(b), (c) and (h)).

(ii) *Benefits attributable to current employer and to prior employers.* Where the current employer maintains or contributes to a plan which is separate from plans maintained or contributed to by prior employers, the amount of the employee's benefit attributable to those prior employers can be readily determined. However, where the current employer maintains or contributes to the same plan as prior employers, the following rule shall apply. The benefit attributable to the current employer shall be the total benefit received by the employee, reduced by the benefit that the employee would have received from the plan if he or she had never worked for the current employer. For purposes of this calculation, it shall be assumed that all benefits have always been vested, even if benefits accrued as a result of service with a prior employer had not in fact been vested.

(4) *Rollover contributions.* Amounts attributable to rollover contributions must be excluded. For purposes of § 1627.17(e), a rollover contribution (as defined in sections 402(a)(5), 403(a)(4), 408(d)(3) and 409(b)(3)(C) of the Internal Revenue Code) shall be treated as an employee contribution. These amounts have already been excluded as a result of the computations set forth in § 1627.17(e)(2). Accordingly, no separate calculation is necessary to comply with this requirement.

(Sec. 12(c)(1) of the Age Discrimination In Employment Act of 1967, as amended by Sec. 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. 98-459, 98 Stat. 1792))

[44 FR 66797, Nov. 21, 1979, as amended at 50 FR 2544, Jan. 17, 1985]

PART 1690—PROCEDURES ON INTERAGENCY COORDINATION OF EQUAL EMPLOYMENT OPPORTUNITY ISSUANCES

Subpart A—General

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Subpart D—Reporting Requirements

1690.401 Reporting requirements.

AUTHORITY: Sec. 715 of Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000e-14); Reorganization Plan No. 1 of 1978, 43 FR 19807; E.O. 12067, 43 FR 28967.

SOURCE: 45 FR 68361, Oct. 14, 1980, unless otherwise noted.

Subpart A—General

§ 1690.101 Subject.

Procedures on Interagency Coordination of Equal Employment Opportunity Issuances.

§ 1690.102 Purpose.

These regulations prescribe the means by which review and consultation shall occur between the Equal Employment Opportunity Commission and other Federal agencies having responsibility for enforcement of Federal statutes, Executive Orders, regulations and policies which require equal employment opportunity without regard to race, color, religion, sex, national origin, age or handicap. Subsequent regulations will expand on standards for the coordination of specific matters referenced or alluded to herein.

§ 1690.103 Supersession.

None. These regulations are the first in a series of instructions issued by EEOC pursuant to its authority under Executive Order 12067.

§ 1690.104 Authority.

These regulations are prepared pursuant to the Equal Employment Opportunity Commission's obligation and authority under Sections 1-303 and 1-304 of Executive Order 12067 (Providing for Coordination of Federal Equal Employment Opportunity Programs) 43 FR 28967, July 5, 1978. (These regulations will also appear as EEOC Management Directive No. 1000).

§ 1690.105 Policy intent.

These procedures will govern the conduct of such agencies in the development of uniform standards, guidelines and policies for defining discrimination, uniform procedures for investigations and compliance reviews and uniform recordkeeping and reporting requirements and training programs. These procedures will also facilitate information sharing and programs to develop appropriate publications and other cooperative programs. The goals of uniformity and consistency are to be achieved with the maximum participation and review on both an informal and formal basis by the relevant Federal agencies and, finally, by the public.

§ 1690.106 Scope.

These regulations apply to Federal agencies having equal employment opportunity program responsibilities or authority other than equal employment responsibilities for their own Federal employees or applicants for employment. Its provisions do not apply to issuances related to internal management or administration of the agency.

§ 1690.107 Definitions.

(a) "Affected Agency" means any agency whose programs, policies, procedures, authority or other statutory mandates (including coverage of groups of employers, unions, State and local governments or other organizations mandated by statute or Executive Order) indicate that the agency may have an interest in the proposed issuance.

(b) "Agencies" means those Executive and independent agencies, agency components, regulatory commissions, and advisory bodies having equal employment opportunity program responsibilities or authority other than equal employment opportunity responsibilities for their own Federal employees.

(c) "Consultation" means the exchange of advice and opinions on a subject occurring among the EEOC and affected agencies before formal submission of the issuance.

(d) "Formal Submission" means the transmittal of a written, publication-ready document by the issuing agency to the EEOC and other affected agencies for at least 15 working days from date of receipt. The formal submission shall take place before the publication of any issuance as a final document.

(e) "Internal or Administrative Documents", pursuant to 1-304 of the Order, may include, but are not limited to, forms for internal audit and recordkeeping; forms for performance and program evaluation; internal directives dealing with program accountability; routine intra-agency budget forms; intra-agency agreements; correspondence which does not transmit significant new policy interpretations or program standards having an impact upon other Federal agencies; tables of organization; and other documents setting forth administrative procedures for the conduct of programs. Internal or administrative documents do not include compliance manuals, training materials, publications or any other internal documents setting forth procedures for the resolution of complaints, standards of review or proof, or any other policies, standards or directives having implications for non-Federal employees.

(f) "Issuance" refers to any rule, regulation, guideline, order, policy directive, procedural directive, legislative proposal, publication, or data collection or recordkeeping instrument. It also includes agency documents as described above, or revisions of such documents, developed pursuant to court order. "Issuance" does not include orders issued to specific parties as a result of adjudicatory-type processes.

(g) "Order" means Executive Order 12067 (Providing for Coordination of Federal Equal Employment Opportunity Programs).

(h) "Public Announcement" means the publication of a document in final form in the FEDERAL REGISTER or any other promulgation for general agency or public reference.

(i) "Significant Issuance" means any issuance which the public must be afforded an opportunity to comment upon. In determining whether an issuance is significant, the EEOC shall apply the following criteria:

(1) The type and number of individuals, businesses, organizations, employers, labor unions, or State and local governments affected;

(2) The compliance and reporting requirements likely to be involved;

(3) The impact on the identification and elimination of discrimination in employment;

(4) The relationship of the proposed issuance to those of other programs and agencies.

[45 FR 68361, Oct. 14, 1980, as amended at 45 FR 71799, Oct. 30, 1980]

Subpart B—Responsibilities

§ 1690.201 Responsibilities.

(a) The Associate Legal Counsel, Coordination and Guidance Services is responsible for coordinating the consultation and review process with other agencies on any issuances covered by the Order.

(b) All Federal agencies shall advise and offer to consult with the EEOC during the development of any proposed issuances, concerning equal employment opportunity which affect the obligations of employers, labor organizations, employment agencies or other Federal agencies.

(c) The Equal Employment Opportunity Commission shall advise and offer to consult with the affected Federal agencies during the development of any proposed issuances concerning equal employment opportunity which affect the obligations of employers, labor organizations, employment agencies or other Federal agencies.

[45 FR 68361, Oct. 14, 1980, as amended at 47 FR 46276, Oct. 18, 1982]

Subpart C—Policies and Procedures

§ 1690.301 Notification to EEOC during development of issuances.

(a) Agencies shall notify the Commission whenever they intend to develop a significant issuance or an issuance affecting other agencies so that potential duplication, overlap, or inconsistency with the proposed issuances of other agencies can be identified before substantial agency time and resources have been expended. The requirement for consultation applies whether or not the agency plans to publish the issuance in the FEDERAL REGISTER for public comment.

(b) Whenever an agency of the Federal government (initiating agency) develops a proposed issuance which will require consultation among the affected agencies, a responsible official of that agency or agency component shall initiate consultation by submitting an early draft of the appropriate documents, preferably after review at the first or second supervisory level, to the chair of the EEOC (ATTN: Associate Legal Counsel, Coordination and Guidance Services). The submission shall be made prior to the point that the issuance is deemed final and ready for publication and shall indicate the appropriate office or person responsible for development of the issuance.

(c) EEOC recognizes that subsequent intra-agency clearance activities may change the policies outlined in the issuance and may add or delete items included in prior drafts. Therefore, during this period of policy development, an initiating agency shall not be bound by the contents of drafts which precede the final draft.

(d) Except as provided in § 1690.307, in no instance shall there be formal submission to the EEOC or the affected agencies without prior consultation pursuant to Section 1-304 of the Order.

(e) Where an agency issuance is related to the internal management or administration of the agency, the issuance is exempt from the consultation process under the Order. The initiating agencies will make the determination of what must be submitted. When the agencies are in doubt, EEOC will determine the extent to which a particular issuance is covered by this exemption.

[45 FR 68361, Oct. 14, 1980, as amended at 47 FR 46276, Oct. 18, 1982]

§ 1690.302 Issuances Proposed by EEOC.

Whenever the EEOC proposes to develop a significant issuance or any issuance requiring consultation, the procedure outlined in these regulations, shall also apply, as set forth in Section 1-303 of the Order. The EEOC shall advise and consult with other affected agencies whenever it develops an issuance, in the same manner and to the same extent as other agencies are required to do in § 1690.301 above and in other sections below.

§ 1690.303 Consultation with affected agencies.

At the start of consultation, the EEOC shall determine which other agencies would be affected by the proposed issuance, and the initiating agency shall consult with such agencies. Initiating agencies shall also consult with other agencies which claim that their internal equal employment opportunity or personnel programs are affected by proposed issuances otherwise directed at external equal employment opportunity efforts. Agencies may consult with any other agencies that they believe would be affected by the issuance. The consultation period shall be determined by the parties. During the consultation period, the EEOC shall seek to resolve any disputes with the initiating agency before publication.

BEST C

§ 1690.304 Coordination of proposed issuance.

(a) *Procedure for publication of proposed issuance.* (1) If the initiating agency, after consultation with EEOC, proposes to publish the issuance for purposes of receiving comments from the public, it shall confer with EEOC and agree on a mutually agreeable length of time, no less than 15 working days, during which the proposal shall be submitted to all affected Federal agencies pursuant to Section 1-304 of the Order. The period of review shall be sufficient to allow all affected agencies reasonable time in which to properly review the proposal.

(2) When an affected agency wishes an extension of the review period, it shall make such request of the initiating agency. If the initiating agency does not grant the request, the affected agency may then make that request of EEOC. EEOC may, at its discretion, grant the additional time requested, whereupon EEOC will inform the initiating agency which shall extend the review period. EEOC shall also inform the initiating agency of the reasons for the extension.

(3) After 15 working days, if the EEOC has not requested an extension of time or otherwise communicated the need for more time to review the proposal, the initiating agency may proceed to publication of the proposed significant issuance for public comment for at least 60 days.

(4) During this public comment period, certain issues may be submitted to employer and employee representatives for comment pursuant to Section 2(c) of Executive Order 12044 (Improving Government Regulations) which requires that agencies give the public an early and meaningful opportunity to participate in the development of significant regulations.

(b) *Procedure for publication of final issuance.* After the period for public comment has closed, the initiating agency shall then incorporate the changes it deems appropriate and forward to EEOC for review, a copy of the document as published, a copy of the document as amended, with changes highlighted, any staff analysis, and a list of commentors. EEOC or affected agencies may review and copy the comments received. The time needed to review these materials shall be agreed on by the EEOC and the initiating agency. After completion of this review, the initiating agency shall formally submit the proposed final issuance to all affected agencies for at least 15 working days prior to publication.

§ 1690.305 Nondisclosure of proposed issuances.

(a) In the interest of encouraging full interagency discussion of these matters and expediting the coordination process, the EEOC will not discuss the proposed issuances of other agencies at an open Commission meeting where disclosure of information would be likely to significantly frustrate implementation of a proposed agency action. The Commission will make this determination on a case by case basis.

(b) Requests by the public for drafts of proposed issuances of another agency will be coordinated, in appropriate circumstances, with that agency and the person submitting the request shall be so notified. The decision made by that agency with respect to such proposed issuances will be honored by the Commission.

[45 FR 68361, Oct. 14, 1980, as amended at 45 FR 71799, Oct. 30, 1980]

§ 1690.306 Formal submission in absence of consultation.

If an initiating agency has an issuance which was already under development on or before July 1, 1978, when Executive Order 12067 became effective, and on which there has been no consultation, the agency shall immediately notify the EEOC of the existence of such proposals and the following procedure shall apply:

(a) EEOC shall confer with the initiating agency and shall determine whether the proposal should be the subject of informal consultation and/or formal submission to other affected Federal agencies pursuant to Section 1-304 of the Order. This does not preclude the right of the agency to consult with any other agency it wishes.

(b) If the EEOC decides that informal consultation and/or formal submission is necessary, it shall confer with the proposing agency and agree on a mutually acceptable length of time for one or both (the informal consultation and/or formal submission).

(c) The period of formal submission shall be sufficient to allow all affected agencies time in which to properly review the proposal. While such period may be longer, in no instance may it be shorter than 15 working days.

§ 1690.307 Temporary waivers.

(a) In the event that the proposed issuance is of great length or complexity, the EEOC may, at its discretion, grant a temporary waiver of the requirements contained in § 1690.303 or § 1690.304. Such waivers may be granted if: (1) The period of consultation and thorough review required for these documents would be so long as to disrupt normal agency operations; or (2) the initiating agency is issuing a document to meet an immediate statutory deadline; or (3) the initiating agency presents other compelling reasons why interim issuance is essential.

(b) In the event of a waiver, the initiating agency shall clearly indicate that the issuance is interim, has been published pursuant to a wavier, and is subject to review. EEOC reserves the right, after publication, to review the document in light of the objectives of the Order. The initiating agency may make substantive conforming changes in light of comments by EEOC and other affected agencies.

[45 FR 68361, Oct. 14, 1980, as amended at 45 FR 71799, Oct. 30, 1980]

§ 1690.308 Notice of unresolved disputes.

(a) The disputes resolution mechanism in Section 1-307 of the Executive Order should be used only in extraordinary circumstances, and only when further good faith efforts on the part of the EEOC and the agency involved would be ineffective in achieving a resolution of the dispute. Before using the disputes resolution mechanism, the EEOC or the initiating agency must have fully participated in the coordination process, including giving notification to the EEOC and the affected agencies of its intention to publish in final within 15 working days.

(b) EEOC or the affected agency shall then send written notification of the dispute and the reasons for it o the EEOC and to the other affected agencies. Thereafter, but within the 15 day notice period, the EEOC or the affected agency may refer the dispute to the Executive Office of the President. Such reference may be made by the Chair of the EEOC or the head of the Federal agency. If no reference is made within 15 working days, the decision of the agency which initiated the proposed issuance will become effective.

§ 1690.309 Interpretation of the Order.

Subject to the dispute resolution procedures set forth above and in accordance with the objectives set forth in 1-201 and the procedures in 1-303 of the Order, the EEOC shall interpret the meaning and intent of the Order. EEOC also will issue procedural changes under the Order, as appropriate, after advice and consultation with affected agencies as provided for in these procedures.

Subpart D—Reporting Requirements

§ 1690.401 Reporting requirements.

The regulations do not establish reporting requirements other than the required notices of proposed rulemaking and formal and informal review.

PART 1691—PROCEDURES FOR COMPLAINTS OF EMPLOYMENT DISCRIMINATION FILED AGAINST RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE

Sec.

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1691.10 Agency enforcement of unresolved complaints.
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AUTHORITY: E.O. 12250, 45 FR 72995 (November 4, 1980) and E.O. 12067, 43 FR 28967 (June 30, 1978).

SOURCE: 48 FR 3574, Jan. 25, 1983, unless otherwise noted.

§ 1691.1 Purpose and application.

The purpose of this regulation is to implement procedures for processing and resolving complaints of employment discrimination filed against recipients of Federal financial assistance subject to Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the State and Local Fiscal Assistance Act of 1972, as amended, and provisions similar to Title VI and Title IX in Federal grant statutes. Enforcement of such provisions in Federal grant statutes is covered by this regulation to the extent they relate to prohibiting employment discrimination on the ground of race, color, national origin, religion or sex in programs receiving Federal financial assistance of the type subject to Title VI or Title IX. This regulation does not, however, apply to the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Juvenile Justice and Delinquency Prevention Act, as amended, the Comprehensive Employment Training Act of 1973, as amended, or Executive Order 11246.

§ 1691.2 Exchange of information.

EEOC and agencies shall share any information relating to the employment policies and practices of recipients of Federal financial assistance that may assist each office in carrying out its responsibilities. Such information shall include, but not necessarily be limited to, affirmative action programs, annual employment reports, complaints, investigative files, conciliation or compliance agreements, and compliance review reports and files.

§ 1691.3 Confidentiality.

When an agency receives information obtained by EEOC, the agency shall observe the confidentiality requirements of Sections 706(b) and 709(e) of Title VII as would EEOC, except in cases where the agency receives the same information from a source independent of EEOC or has referred a joint complaint to EEOC under this regulation. In such cases, the agency may use independent source information or information obtained by EEOC under the agency's investigative authority in a subsequent Title VI, Title IX or revenue sharing act enforcement proceeding. Agency questions concerning confidentiality shall be directed to the Associate Legal Counsel for Legal Services, Office of Legal Counsel of EEOC.

§ 1691.4 Standards for investigation, reviews and hearings.

In any investigation, compliance review, hearing or other proceeding, agencies shall consider Title VII case law and EEOC Guidelines, 29 CFR Parts 1604-1607, unless inapplicable, in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice.

§ 1691.5 Agency processing of complaints of employment discrimination.

(a) Within ten days of receipt of a complaint of employment discrimination, an agency shall notify the respondent that it has received a complaint of employment discrimination, including the date, place and circumstances of the alleged unlawful employment practice.

(b) Within thirty days of receipt of a complaint of employment discrimination an agency shall:

(1) Determine whether it has jurisdiction over the complaint under Title VI, Title IX, or the revenue sharing act; and

(2) Determine whether EEOC may have jurisdiction over the complaint under Title VII or the Equal Pay Act.

(c) An agency shall transfer to EEOC a complaint of employment discrimination over which it does not have jurisdiction but over which EEOC may have jurisdiction within thirty days of receipt of a complaint. At the same time, the agency shall notify the complainant and the respondent of the transfer, the reason for the transfer, the location of the EEOC office to which the complaint was transferred and that the date the agency received the complaint will be deemed the date it was received by EEOC.

(d) If an agency determines that a complaint of employment discrimination is a joint complaint, then the agency may refer the complaint to EEOC. The agency need not consult with EEOC prior to such a referral. An agency referral of a joint complaint should occur within thirty days of receipt of the complaint.

(e) An agency shall refer to EEOC all joint complaints solely alleging employment discrimination against an individual. If an agency determines that special circumstances warrant its investigation of such a joint complaint, then the agency shall determine whether the complainant has filed a similar charge of employment discrimination with EEOC.

(1) If an agency determines that the complainant has filed a similar charge of employment discrimination with EEOC, then the agency may investigate the complaint if EEOC agrees to defer its investigation pending the agency investigation.

(2) If an agency determines that the complainant has not filed a similar charge of employment discrimination with EEOC, then the agency may investigate the complaint if special circumstances warrant such action. In such cases, EEOC shall defer its investigation of the referred joint complaint pending the agency investigation.

(f) An agency shall not refer to EEOC a joint complaint alleging a pattern or practice of employment discrimination unless special circumstances warrant agency referral of the complaint to EEOC.

(g) If a joint complaint alleges discrimination in employment and in other practices of a recipient, an agency should, absent special circumstances, handle the entire complaint under the agency's own investigation procedures. In such cases, the agency shall determine whether the complainant has filed a similar charge of employment discrimination with EEOC. If such a charge has been filed, the agency and EEOC shall coordinate their activities. Upon agency request, EEOC should ordinarily defer its investigation pending the agency investigation.

(h) When a joint complaint is referred to EEOC for investigation, the agency shall advise EEOC of the relevant civil rights provision(s) applicable to the employment practices of the recipient, whether the agency wants to receive advance notice of any conciliation negotiations, whether the agency wants EEOC to seek information concerning the relationship between the alleged discrimination and the recipient's Federally assisted programs or activities and, where appropriate, whether a primary objective of the Federal financial assistance is to provide employment. The agency shall also notify the complainant and the recipient of the referral, the location of the EEOC office to which the complaint was referred, the identity of the civil rights provision(s) involved, the authority of EEOC under this regulation and that the date the agency received the complaint will be deemed the date it was received by EEOC. Specifically, the notice shall inform the recipient that the agency has delegated to EEOC its investigative authority under Title VI, Title IX, or the revenue sharing act, and the relevant act's implementing regulations. The agency, therefore, may use information obtained by EEOC under the agency's investigative authority in a subsequent Title VI, Title IX or revenue sharing act enforcement proceeding.

§ 1691.6 General rules concerning EEOC action on complaints.

(a) A complaint of employment discrimination filed with an agency, which is transferred or referred to EEOC under this regulation, shall be deemed a charge received by EEOC. For all purposes under Title VII and the Equal Pay Act, the date such a complaint was received by an agency shall be deemed the date it was received by EEOC.

(b) When EEOC investigates a joint complaint it shall, where appropriate, seek sufficient information to allow the referring agency to determine whether the alleged employment discrimination is in a program or activity that receives Federal financial assistance and/or whether the alleged employment discrimination causes discrimination with respect to beneficiaries or potential beneficiaries of the assisted program.

(c) Upon referral of a joint complaint alleging a pattern or practice of employment discrimination, EEOC generally will limit its investigation to the allegation(s) which directly affect the complainant.

(d) If EEOC, in the course of an investigation of a joint complaint, is unable to obtain information from a recipient through voluntary means, EEOC shall consult with the referring agency to determine an appropriate course of action.

(e) If EEOC agrees to defer its investigation of a complaint of employment discrimination pending an agency investigation of the complaint, then EEOC shall give due weight to the agency's determination concerning the complaint.

§ 1691.7 EEOC dismissals of complaints.

If EEOC determines that the Title VII allegations of a joint complaint should be dismissed, EEOC shall notify the complainant and the recipient of the reason for the dismissal and the effect the dismissal has on the complainant's rights under the relevant civil rights provision(s) of the referring agency, and issue a notice of right to sue under Title VII. At the same time, EEOC shall transmit to the referring agency a copy of EEOC's file.

§ 1691.8 Agency action on complaints dismissed by EEOC.

Upon EEOC's transmittal of a dismissal under § 1691.7 of this part, the referring agency shall determine within thirty days, what, if any, action the agency intends to take with respect to the complaint and then notify the complainant and the recipient. In reaching that determination, the referring agency shall give due weight to EEOC's determination that the Title VII allegations of the joint complaint should be dismissed. If the referring agency decides to take action with respect to a complaint that EEOC has dismissed for lack of reasonable cause to believe that Title VII has been violated, the agency shall notify the Assistant Attorney General and the Chairman of the EEOC in writing of the action it plans to take and the basis of its decision to take such action.

§ 1691.9 EEOC reasonable cause determinations and conciliation efforts.

(a) If EEOC, after investigation of a joint complaint, determines that reasonable cause exists to believe that Title VII has been violated, EEOC shall advise the referring agency, the complainant and the recipient of that determination and attempt to resolve the complaint by informal methods of conference, conciliation and persuasion. If EEOC would like the referring agency to participate in conciliation negotiations, EEOC shall so notify the agency and the agency shall participate. EEOC shall provide advance notice of any conciliation negotiations to referring agencies that request such notice, whether or not EEOC requests their participation in the negotiations.

(b) If EEOC's efforts to resolve the complaint by informal methods of conference, conciliation and persuasion fail, EEOC shall:

(1) Issue a notice of failure of conciliation to the recipient in accordance with 29 CFR 1601.25;

(2) Transmit to the referring agency a copy of EEOC's investigative file, including its Letter of Determination and notice of failure of conciliation;

(3) If the recipient is not a government, governmental entity or political subdivision, determine whether EEOC will bring suit under Title VII and, in accordance with 29 CFR 1601.28, issue a notice of right to sue under Title VII;

(4) If the recipient is a government, governmental entity or political subdivision, refer the matter to the Attorney General in accordance with 29 CFR 1601.29. The Attorney General, or his or her delegate, will determine whether the Department of Justice will bring suit under Title VII and, in

accordance with 29 CFR 1601.28, issue a notice of right to sue under Title VII.

§ 1691.10 Agency enforcement of unresolved complaints.

(a) Upon EEOC's transmittal of a reasonable cause determination and notice of failure of conciliation under § 1691.9(b)(2) of this regulation, the referring agency shall determine, within thirty days, whether the recipient has violated any applicable civil rights provision(s) which the agency has a responsibility to enforce. The referring agency shall give due weight to EEOC's determination that reasonable cause exists to believe that Title VII has been violated.

(b) If the referring agency determines that the recipient has violated any applicable civil rights provision(s) which the agency has a responsibility to enforce, the agency shall so notify the complainant and the recipient and determine whether further efforts to obtain voluntary compliance are warranted. In reaching that determination, the agency shall give due weight to the failure of EEOC's efforts to resolve the complaint by informal methods. If the referring agency determines that further efforts to obtain voluntary compliance are not warranted or if such further efforts fail, the agency shall initiate appropriate enforcement proceedings under its own regulations.

(c) If the referring agency determines that the recipient has not violated any applicable civil rights provision(s) which the agency has a responsibility to enforce, the agency shall notify the complainant, the recipient, the Assistant Attorney General and the Chairman of the EEOC in writing of the basis of that determination.

§ 1691.11 EEOC negotiated settlements and conciliation agreements.

If the parties enter into a negotiated settlement (as described in 29 CFR 1601.20) prior to a determination or a conciliation agreement (as described in 29 CFR 1601.24) after a determination, EEOC shall notify the referring agency that the complaint has been settled. The agency shall take no further action on the complaint of employment discrimination thereafter except that the agency may take the existence of the complaint into account in scheduling the recipient for a review under the agency's regulations.

§ 1691.12 Interagency consultation.

(a) Before investigating whether the employment practices of a recipient of Federal financial assistance constitute a pattern or practice of unlawful discrimination or initiating formal administrative enforcement procedures on that basis, an agency shall, to the extent practical, consult with the Chairman of the EEOC and the Assistant Attorney General to assure that duplication of effort will be minimized.

(b) Prior to the initiation of any legal action against a recipient of Federal financial assistance alleging unlawful employment practices, the Department of Justice and/or EEOC shall, to the extent practical, notify the appropriate agency or agencies of the proposed action and the substance of the allegations.

§ 1691.13 Definitions.

As used in this regulation, the term:

(a) "Agency" means any Federal department or agency which extends Federal financial assistance subject to any civil rights provision(s) to which this regulation applies.

(b) "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice, or his or her delegate.

(c) "Chairman of the EEOC" refers to the Chairman of the Equal Employment Opportunity Commission, or his or her delegate.

(d) "EEOC" means the Equal Employment Opportunity Commission and, where appropriate, any of its District Offices.

(e) "Federal financial assistance" includes: (1) Grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal

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property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance. For purposes of this regulation, the term "Federal financial assistance" also includes funds disbursed under the revenue sharing act.

(f) "Joint complaint" means a complaint of employment discrimination covered by Title VII or the Equal Pay Act and by Title VI, Title IX, or the revenue sharing act.

(g) "Recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under such program.

(h) "Revenue sharing act" refers to the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. 1221 *et seq.*

(i) "Title VI" refers to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d-4. Where appropriate, "Title VI" also refers to the civil rights provisions of other Federal statutes or regulations to the extent that they prohibit employment discrimination on the grounds of race, color, religion, sex or national origin in programs receiving Federal financial assistance of the type subject to Title VI itself.

(j) "Title VII" refers to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*

(k) "Title IX" refers to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 to 1683.

PARTS 1692–1899 [RESERVED]

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